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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-206

THERMTRON PRODUCTS, INC. (Erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD ..... PETITIONERS

vs.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY .. RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THERMTRON PRODUCTS, INC. (Erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD ..... PETITIONERS

vs.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY .. RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of *Certiorari* issue to review the Order or Judgment of the United States Court of Appeals for the Sixth Circuit, entered June 4, 1974, denying the Petition of the Petitioners for Writ of Mandamus and/or Writ of Prohibition.

OPINIONS BELOW

The Order or Judgment of the United States Court of Appeals for the Sixth Circuit is unreported and appears in the Appendix hereto, *infra*, page 1a-2a. The Order of the United States District Court for the Eastern District of Kentucky, at Pikeville, remanding the Civil Action styled *Jay Lee Little and Lona Little* vs. *Therntron*

Products, Inc. and Larry Dean Newhard is set forth in the Appendix hereto, *infra*, p. 3a-6a.

JURISDICTION

The Order or Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 4, 1974. The Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTION PRESENTED

Whether the Respondent, a United States District Court Judge, can arbitrarily deny the statutory rights of these Petitioners in remanding a diversity action to a state court merely because of a crowded docket, when, by his own admission, the Petition for removal was timely filed and in strict compliance with the statutory provisions for removal of cases, thus conferring jurisdiction upon the District Court.

STATUTES INVOLVED

United States Code, Title 28:

§1441. **Actions removable generally**

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the dis-

trict and division embracing the place where such action is pending.

§1446. **Procedure for removal**

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State Court shall file in the district court of the United States for the district and division within which such action is pending a verified petition contaning a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleadings has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

* * *

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond

with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond, the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * *

§1447. **Procedure after removal generally**

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before if all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State Court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State

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court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

On April 9, 1973, Jay Lee Little and Lona Little, citizens and residents of the Commonwealth of Kentucky, commenced an action in the Pike Circuit Court, Pike County, Kentucky, against these Petitioners. Petitioner, Thermtron Products, Inc., is incorporated under the laws of the State of Indiana, with its principal place of business in Indiana, and a citizen and resident thereof. Petitioner, Larry Dean Newhard, is a citizen and resident of the State of Indiana. Service of process upon the Petitioners was obtained by substituted service of process upon the Secretary of State of the Commonwealth of Kentucky, on April 10, 1973.

On April 26, 1973, pursuant to and in strict compliance with the provisions of 28 U. S. C. §1441 and §1446, the Petitioners filed a Petition for Removal in the United States District Court for the Eastern District of Kentucky, at Pikeville, executed a bond for removal, served notice of removal upon the Plaintiffs below, and the Clerk of the Pike Circuit Court, and filed an Answer to the Complaint of the Plaintiffs in Civil Action No. 1723, in the United States District Court for the Eastern District of Kentucky.

It is undisputed, and, in fact, conceded by the Respondent herein that the Petitioners properly re-

moved this action from the Pike Circuit Court to the United States District Court for the Eastern District of Kentucky. Furthermore, it is uncontroverted that the United States District Court for the Eastern District of Kentucky and the Respondent herein properly recognized, assumed, and exercised jurisdiction over the within action, there being no jurisdictional defects whatsoever in the removal thereof nor any objection ever made to jurisdiction by the plaintiffs below.

Nevertheless, on February 5, 1974, more than nine months after the proper removal by the Petitioners, and shortly after the Petitioners had served notice to take the discovery depositions of the plaintiffs below, the Respondent herein, *sua sponte*, entered an Order requiring these Petitioners to show cause why the action should not be remanded to the Pike Circuit Court since "there is no available time in which to try the above styled action in the foreseeable future," despite a finding made by the Respondent that the within action "was removed pursuant to the provisions of 28 U. S. C. §1446."

Petitioners, on February 11, 1974, filed a Response to the aforementioned Order and objected to remand upon the grounds that once it was determined the Petition for Removal complied with the statutory requirements, with respect to jurisdictional allegations, the District Court was vested with jurisdiction and the Petitioners had a statutory right to have the case decided in Federal Court. Petitioners also declared that they did not believe they could receive a fair and impartial trial in the Pike Circuit Court.

On March 22, 1974, the Respondent, District Judge, conceded that these Petitioners "have a right to remove an action brought in State Court if the provisions of 28 U. S. C. §1441 *et seq.* are properly followed," however, the Respondent nevertheless remanded the case to the State court, stating as follows:

> "That right afforded the defendants, however, must be balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action. The Court finds the right to choice of forum to be of little particular consequence. The plaintiffs' right to a speedy decision on the merits of their cause of action is of much greater significance."

As justification for this balancing process, the Respondent cited a heavy case load and crowded docket, with underlying priorities, as evidence of the impairment of the plaintiffs' right of redress. Respondent concluded that the statutory rights of the Petitioners herein would not suffer if this action was remanded.

Petitioners, thereafter, sought extraordinary relief, by Writ of Mandamus and/or Writ of Prohibition, in the United States Court of Appeals for the Sixth Circuit. The relief sought by the Petitioners was founded upon the following principles:

1. It is the exclusive right of the Petitioners, pursuant to 28 U. S. C. §1441, *et seq.*, to remove this action from State court which right may not be substantively or procedurally denied these petitioners, nor may it be "balanced" weighed, or otherwise, against

other discretionary considerations where the action was properly removed in all jurisdictional requirements and in strict compliance therewith.

2. Respondent has no authority, whatsoever, or any discretion to divest the United States District Court for the Eastern District of Kentucky of jurisdiction over the parties or subject matter, where the District court recognized, assumed, and properly exercised jurisdiction, in a case properly removed, where there is no objection, nor question with regard to jurisdiction, and where it is the mandatory duty of the Respondent to retain jurisdiction, once properly determined and exercised as herein done.

3. The Memorandum, Opinion and Order of Remand clearly ignores and violates the mandatory and unambiguous provisions of 28 U. S. C. §1441, *et seq.*, so as to deprive the petitioners of their statutory rights.

Respondent replied to the aforementioned statements by stating, in essence, that removal is but a mere privilage and subject to judicial discretion. Although the Respondent stated that "there is no doubt merit in defendants' argument of being in Federal Court as a matter of right," it was asserted that this does not outweigh the plaintiffs' right to have a reasonably timely trial.

On June 4, 1974, the United States Circuit Court of Appeals for the Sixth Circuit denied the Petition for Writ of Mandamus and/or Writ of Prohibition upon the grounds that it did not have jurisdiction to review the Order of Remand.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE PROPER INTERPRETATION OF 28 U. S. C. §1447 (c) and (d).

Neither the language nor the spirit of 28 U. S. C. §1441, *et seq.* prevents a Circuit Court of Appeals or this Court from exercising jurisdiction to hear and decide a case which has been wrongfully remanded. To hold otherwise is to grant District Court Judges unbridled discretion to remand for which there would be no review, and leave non resident removing parties without any remedy.

The consequences and ramifications of permitting unlimited discretion to remand diversity cases, without the possibility of judicial review, are most apparent. The inequity and denial of a statutory right are even more obvious. "Shuffling" Sam Thompson, of Louisville, Kentucky, had his case reviewed on direct appeal, from the Louisville Police Court to this Court. Only by hearing his case was he provided a remedy and an injustice prevented. *Thompson* vs. *City of Louisville,* 362 U. S. 199 (1960). The case of these Petitioners is identical. To follow the course of the Court of Appeals for the Sixth Circuit, in refusing to entertain jurisdiction, would conclusively deny these Petitioners and untold other litigants, in the future, of any possible review or remedy in similar cases, wrongfully remanded. For this very reason, it has been necessary for several Circuit courts of Appeals to

exercise jurisdiction and grant review of Writs of Mandamus.

In *Travelers' Protective Association of America* vs. *Smith*, 71 F. 2d 511 (4th Cir. 1934), the case was duly removed to Federal Court on the ground of diversity of citizenship. The propriety of the removal was never challenged, as in the instant case. After the defendant answered, the plaintiffs filed a written waiver of their right to recover in excess of $3,000.00 and remitted to the defendant any excess. Plaintiffs then moved that the cause be remanded to the State court upon the ground that the action did not exceed the minimum jurisdictional amount. The District Court Judge granted the motion and entered an Order remanding the case, without finding that it had been improperly removed and without anything appearing of record to show that the removal was in any wise improper. Defendant appealed from the Order of Remand and requested leave to file a petition for a Writ of Mandamus. The Circuit Court of Appeals for the Fourth Circuit denied the right of appeal, however, granted leave to file a Petition for Writ of Mandamus. In concluding that the case merited a remedy, when the District Court had improperly remanded the case, the Court made a distinction between remand upon jurisdictional grounds and remand upon other grounds.

> "It is clear that the effect of this statutory provision is to forbid appellate review of an order remanding a case when 'the district court shall decide that the case was improperly removed.' In such case, the order of remand is a final determination of the right to remove and is not reviewable by appeal, mandamus

> or otherwise. And we think that, even though the court may not make an express finding as to improper removal, the order of remand is not subject to review, if upon the record, the presumption can be indulged that the order was made because the court was of the opinion that the removal was improper; for in such case the maxim applies *omnia praesumuntur rite esse acta*. But where, as here, it clearly appears that the order was made, not because the court decided that the cause had been improperly removed, but because of a remittiture entered after it had admittedly acquired jurisdiction, we do not think that either the words or the spirit of the statute prevents our directing that it proceed to exercise that jurisdiction by hearing and deciding the case.
>
> "* * * We have carefully examined the authorities which hold that, because of the provisions of Section 28 of the Judicial Code, mandamus no longer lies to require a district court to hear and determine a case which has been remanded. The language of some of the cases is very broad, but they must be interpreted in connection with the facts under review, and in all of them there was express or implied finding of improper removal. In none of the cases which we have been able to find has it been held that the effect of the statute is to deprive the appellate court of the power to require the trial court to hear and decide a case which has been properly removed and which has been remanded solely on the ground of action taken subsequent to removal which did not affect jurisdiction.
>
> "If the provision of Section 28 of the Judicial Code be construed as forbidding review of an order of remand in a case such as this, a party in the situation of the defendant here will be without remedy; for

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it is settled that in cases to which that provision applies the order remanding the case to the state court is not reviewable even upon appeal from the state court. (Citations omitted). We do not think that it was the intention of Congress that a party entitled to invoke the federal jurisdiction should be without remedy if the court, without a finding express or implied of improper removal, should remand the case to the state court on a ground arising after removal and not affecting jurisdiction. Certainly we do not find in the statutes any evidence of such intention.

"* * * Leave will be granted defendant to file a petition for writ of mandamus requiring the court below to hear and determine the case. It will probably not be necessary for defendant to file such petition, as the learned judge may of his own motion vacate the order remanding the case and proceed to hear and decide it." (*Id.* at 512-513).

In *Bankers Securities Corp.* vs. *Insurance Equities Corp.*, 85 F. 2d 856 (3d Cir. 1936), the Third Circuit Court likewise noted a distinction between remand upon jurisdictional grounds and remand upon procedural grounds, holding the latter reviewable by mandamus. In that case, the parties agreed to extend the time limits within which the plaintiff could file a reply to the answer and counterclaim of the defendant. After the time for the original pleadings had expired, but before the stipulated extension of time had run, the plaintiff petitioned for removal. The District Court remanded the case upon the grounds that the extension of time for pleading did not extend the time for removal. Upon petition for a Writ of Mandamus the Circuit Court of Appeals for the

Third Circuit granted review thereof. The reasoning of the Court, at page 859, is as follows:

"If the order remanding the cause to the State court was based upon the ground that it had been 'improperly removed' because the federal court had no jurisdiction, it is not reviewable by appeal, writ of error, or mandamus . . . . In such case, the order would be a final determination of the issue. But, if the order remanding the cause was based upon procedural grounds, not affecting the jurisdiction of the Court, it may be reviewed by mandamus. *Travelers Protective Association* vs. *Smith* (C. C. A.) 71 F (2d) 511, 512. Section 28 of the Judicial Code is jurisdictional, authorizing the removal of certain kinds of causes to be removed into the federal court and Section 29 is procedural, providing how and when such causes may be removed. From an order remanding a cause arising under Section 28 there is no review, but from an order remanding a cause on procedural grounds under Section 29, there may be a review. This is perfectly plain from the reasoning, logic, and direct statements made in the case of Ayers vs. Watson, 113 U. S. 594, 598; . . . .

The Circuit Court of Appeals for the Sixth Circuit, in *Direct Transit Lines* vs. *Local Union, No. 406*, 199 F. 2d 89 (6th Cir 1952), has stated that a cause, removed to District Court, should not be remanded if it were properly removable upon the record as it stood at the time of the filing of the petition for removal. It is, therefore, clear that the Sixth Circuit ignored and refused to consider a basic principle previously espoused. Although the *Direct Transit Lines case, supra*, was partially dis-

tinguished in *Hat Corp. of America* vs. *United Hatters, etc.*, (D. C. Conn.) 114 F. Supp. 890 (1953), the proposition that a case should not be remanded if properly removed still stands in the Sixth Circuit.

Although Petitioners recognize that if an action is improvidently removed and jurisdictionally defective, no review of an order of remand would lie, such is not the case here. The wrongful Order of Remand, entered by the Respondent, was not founded upon informed judicial determination that the removal was improvident, or that the District Court lacked jurisdiction, or any other legal conclusion but was arbitrarily based upon considerations of docket priorities and impairment of the plaintiffs' right of redress. Despite the decision of the Court of Appeals for the Sixth Circuit in *Stein's Stores* vs. *Taylor,* 216 F. 2d 439 (6th Cir. 1954), wherein the Court declared that a Writ of Mandamus is not available to review the legal conclusions of a District Court in remanding a cause to a State court, the petitioners submit that the Order of Remand, in the instant action, was not based upon any legal conclusions, but only upon certain considerations which have no legal foundation in the statutory scheme. Thus, the conclusion of the Circuit Court of Appeals for the Sixth Circuit that it had no jurisdiction to review the wrongful Order of Remand is in conflict with the decisions of the Third and Fourth Circuit Courts of appeals and with the principles enunciated by the Sixth Circuit itself.

II

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT CONCLUSIVELY DEPRIVED THE PETITIONERS OF ANY REMEDY, WHATSOEVER, AND TOTALLY FAILED TO RESOLVE THE RECURRING ARGUMENT OF WHETHER A DISTRICT COURT JUDGE IS CONSTRAINED TO RETAIN JURISDICTION OVER DIVERSITY ACTIONS, PROPERLY REMOVED, AND FORBIDDEN TO ARBITRARILY REMAND SUCH ACTIONS UPON PURELY DISCRETIONARY GROUNDS, OTHER THAN NON-WAIVABLE JURISDICTIONAL DEFECTS, WHICH RECURRING ARGUMENT GREATLY AFFECTS FEDERAL JURISDICTION IN THE DISTRICT COURTS.

Petitioners, as admitted by the Respondent herein, properly removed this action in strict compliance with all statutory and jurisdictional requirements. Respondent arbitrarily remanded the action upon purely discretionary grounds, after having previously properly assumed and exercised jurisdiction. The refusal of the Circuit Court of Appeals for the Sixth Circuit to accept jurisdiction and determine the issue involved herein granted continued and unlimited discretion to the Respondent and other District Court Judges to remand cases, even though properly removed, as they see fit. In so doing, the Circuit Court of Appeals for the Sixth Circuit has also prevented these Petitioners from obtaining any review, whatsoever, of the purely discretionary decision of the Respondent. The denial of review to these Petitioners is unconscionable. Furthermore, to permit such unbridled discretion would certainly have considerable impact upon

Federal Jurisdiction, not only within the Sixth Circuit, but throughout the nation.

The argument pronounced in Judicial decree by the Respondent has recurred in various courts, however, that contention has been consistently rejected.

In *Romero* vs. *ITE Imperial Corporations*, 332 F. Supp. 523 (D.C.P.R. 1971), a timely petition for removal was filed on January 19, 1971. On July 7, 1971, the plaintiff filed a motion to remand based upon the grounds that a remand would speed up the proceedings and would therefore be in the interest of justice. The Court stated, at page 526, as follows:

> "The right to remove an action from a state court to the Federal District Court is a *statutory* right and it is a right that has existed since the original Judiciary Act of 1789. (Citations omitted) 'The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants.' (Citation omitted).
>
> *Plaintiff's argument to the effect that a remand would speed up the proceedings in this case and would therefore be in the interest of justice is not correct . . . Once the statutory requirements for the right of removal have been met, this court cannot order a remand on discretionary grounds such as the alleged speedier trial to be afforded the plaintiff.*" (emphasis added).

In *Vann* vs. *Jackson*, 165 F. Supp. 377 (E. D. N. C. 1958), the Court addressed the issue of discretionary authority to remand, at pages 380-381, as follows:

> "[T]he proposition has been advanced that the court has discretionary power to remand this case to the state court, even though properly removed to the federal court. In considering this question, the court must exercise care to determine that a discretionary power does exist, and that it will be in the interest of justice to exercise such discretion.
>
> * * * Since there is no means for reviewing an order remanding a case to a state court, the court should act with caution in determining whether or not a power to remand exists. (Citation omitted). The court is without power to remand if no discretionary power exists.
>
> * * * It is concluded that where congress has provided both a state and a federal forum, and has further provided for actions first brought in the state court to be removed to the federal court, *no discretionary power exists to remand the case to the state court.*" (emphasis added).

In *Isbrandtsen* vs. *District 2, Marine Engineers Beneficial Association, AFL-CIO*, 256 F. Supp. 68 (E. D. N. Y. 1966), the District Judge gave short shrift to the argument that despite the Court's jurisdiction, that it had discretion to remand, at page 77, as follows:

> "The Union urges the court to remand to the state court despite a finding that it has jurisdiction. It advances a most unusual argument. It agrees that, regardless of the forum, federal law should and will be applied. . . . It assumes that despite a finding of federal court jurisdiction, this court has the discretionary power to remand and reminds the court that, should it remand, its order would not be sub-

> ject to review. . . . Having jurisdiction, this court, in my view, has no discretionary power to remand in a case such as this which does not call for the application of the doctrine of abstention. Even if there were such a discretionary power, the Court would not exercise it in favor of a remand."

In *Davis* vs. *Joyner,* 240 F. Supp. 689 (E. D. N. C. 1964), the identical question presented in the case of *Vann* vs. *Jackson, supra,* and *Larkin* vs. *Roseberry,* 54 F. Supp. 373 (E. D. Ky. 1944), was presented to the Court. The court, therein, stated, at page 691, that the court's authority to remand is found in Title 28 U. S. C. §1447 (c) and provides that the District Court shall remand if "it appears that the case was removed improvidently and without jurisdiction." It was held that this was certainly not the case in that instance, and it is certainly not the case, in the instant action.

The statutory right of removal is a valuable right which must be protected by the District Courts. *Home Insurance Co.* vs. *Morse,* 20 Wall 445, 22 L. Ed. 365 (1874); *Muller* vs. *Lyke Coastwise Line,* 144 F. Supp. 135 (S. D. Tex. 1940); and *Gentle* vs. *Lamb-Weston, Inc.,* 302 F. Supp. 161 (N. D. Maine 1969). Thus, when a District Court is presented with an action of which it has cognizance it may not turn the matter over for adjudication to the State court. *Mach-Tronics, Incorporated* vs. *Zirpoli,* 316 F. 2d 820 (9th Cir. 1963).

It is readily apparent that the recurring argument, propounded by litigants in favor of granting discretionary power to remand, has been consistently rejected by

District Court Judges. Respondent is apparently the first District Court Judge to actually infer such discretionary power, *sua sponte,* to remand or infer such discretionary power from the statutory provisions, where such discretion is not founded upon any legal basis or jurisdictional basis but solely upon discretionary considerations. Such discretion cannot be justified. Only if an action is removed "improvidently," which means "wrongfully or without legal basis," and if the District Court is without jurisdiction can a case be remanded. *Harlan Laboratory* vs. *Topp's Chewing Gum,* 131 F. Supp. 262, 267 (E. D. N. Y. 1955). Of course, in those cases removed improvidently and without jurisdiction, the judicial discretion exercised is based upon legal conclusions and not discretionary considerations. Such is certainly not the instant case.

It is, therefore, submitted that these Petitioners be afforded at least a review of the discretionary decisions below. "Remedies for rights are ever favorably extended." 18 Vin. Abr. 521.

CONCLUSION

For the aforementioned reasons, a Writ of Certiorari should issue to review the Order and Judgment of the Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

FILED JUN 4 - 1974
JOHN P. HEHMAN, Clerk

No. 74 - 1410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THERMTRON PRODUCTS, INC.
and
LARRY DEAN NEWHARD, PETITIONERS

vs

HONORABLE H. DAVID
HERMANSDORFER, JUDGE,
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF KENTUCKY, RESPONDENT

ORDER

Before WEICK, EDWARDS and ENGEL, Circuit Judges.

Upon consideration, the petition for a writ of mandamus and/or the petition for writ of prohibition are each hereby denied for the reason that such remedies are not available to review an order of the District Court remanding a case to the state court from which it had been removed. 28 U.S.C. § 1447(d); *United States* v. *Rice*, 327 U.S. 742 (1946); *Kloeb* v. *Armour & Co.*, 311 U.S. 199 (1940); *In Re Pennsylvania Co.*, 137 U.S. 451 (1890); *Stein Stores* v. *Taylor*, 216 F.2d 439 (6th Cir. 1954).

In our opinion the District Court had jurisdiction to enter the order of remand. We have no jurisdiction to review it.

This matter will be reported to the Circuit Council for the Sixth Circuit, which has supervisory powers over the District Court.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

* * * * * * *

FILED MAR 22 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1723

JAY LEE LITTLE and
LONA LITTLE, PLAINTIFFS,

VS:

THERNTRON PRODUCTS, INC. and
LARRY DEAN NEWHARD, DEFENDANTS,

MEMORANDUM OPINION AND ORDER

This action is before the Court following the defendants' response to an Order of this Court entered herein on February 5, 1974 which required the defendants to show cause as to why the ends of justice do not require this matter to be remanded to the Pike Circuit Court, Pike County, Kentucky from which it was removed on April 30, 1973.

The defendants contend that they have been granted the right to remove an action brought in state court if the provisions of 28 U.S.C. §1441 *et seq.* are properly followed. The Court must concede that fact.

That right afforded the defendants, however, must be balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action. The Court finds the right to choice of forum to be of little particular con-

sequence. The plaintiffs' right to a speedy decision on the merits of their cause of action is of much greater significance.

At the close of business on February 28, 1974 there were pending on the dockets for which this Court has primary responsibility a total of eighty (80) criminal actions and three hundred ninety-four (394) civil actions. These cases have been assigned various priorities. The first priority is granted criminal actions. Social Security and Black Lung cases[1] have a priority second only to criminal cases. *Webb* v. *Richardson,* 472 F.2d 529, 538 (6th Cir. 1972). A third priority is granted those actions in which the United States is a party. The lowest priority, as a matter of necessity, is assigned private civil actions.

Consequently, the period between the filing of such actions and the time in which they are assigned for trial must, regretably, continually be extended. It therefore is obvious to the Court that the plaintiffs' right of redress is being severely impaired as a result. Such would not be the case if the cause had not been removed from the state courts.[2]

---

1. At the present time the Eastern District of Kentucky is experiencing an influx of Black Lung actions. The Department of Health, Education and Welfare predicts that a total in excess of four thousand (4,000) of these actions will ultimately be filed in this District.

2. The Court has been informed that the courts of the Commonwealth are not faced with a large back-log of cases and can dispose of any civil case withone (1) year of the date of filing.

The purpose of the removal statute was specifically to relieve a party of the possibility of local prejudice when faced with a suit in the local courts. It must also be noted that the predecessor of the present removal statute was aptly entitled the Prejudice or Local Influence Act of 1867, 14 Stat. 558. Vol. 1A, Moore's Federal Practice, Para. 0.156[1], p. 42. As the Court has provided the defendants with an opportunity to set forth any possible prejudice that remand could precipitate and no such showing has been made, the Court must conclude that the defendants' right would not suffer if this action were to be remanded.

Accordingly, this action shall be, and the same hereby is, REMANDED to the Pike Circuit Court, Pike County, Kentucky.

The Clerk of this Court shall prepare and mail a certified copy of this order of remand to the Clerk, Pike Circuit Court, Pike County, Kentucky.

IT IS SO ORDERED this 22 day of March, 1974.

/s/ H. David Hermansdorfer
H. DAVID
HERMANSDORFER, Judge

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court

By /s/ Dorothy B. Ward
D. C.

NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT ON 3/25/74

DAVIS T. MC GARVEY, CLERK

BY: /s/ Dorothy B. Ward D.C.

* * * * * * *

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-206

THERMTRON PRODUCTS, INC. (Erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD — PETITIONERS

vs.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 29, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975

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RELEVANT DOCKET ENTRIES

4/30/73: PETITION FOR REMOVAL, Copy of proceedings in Pike Circuit Court, Removal Bond, Notice of Removal, and ANSWER of Defendants filed.

2/6/74: ORDER: entered 2/5/74, requiring Defendants to show cause within ten days why the ends of justice do not require that this matter be remanded to the Pike Circuit Court.

2/13/74: OBJECTIONS to remanding with Memorandum is support filed by Defendants.

2/13/74: NOTICE OF DEFENDANTS to take Depositions of Plaintiffs on 2/21/74.

3/25/74: MEMORANDUM OPINION AND ORDER; signed and filed 3/22/74: remanded to Pike Circuit Court.

CLOSED.

4/12/74: Depositions of Jay Lee Little and Lona Little taken for purpose of discovery filed.

4/11/74: PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION FILED By Petitioners.

4/19/74: RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION FILED By Respondent.

4/25/74: MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM OF AUTHORITIES and MEMORANDUM OF SUPPLEMENTAL AUTHORITIES filed in support of Petition for Writ of Mandamus and/or for Writ of Prohibition.

6/4/74: ORDER: signed and filed 6/4/74, denying Petition for Writ of Mandamus and/or Petition for Writ of Prohibition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

JAY LEE LITTLE and
LONA LITTLE PLAINTIFFS

VS. **PETITION FOR REMOVAL** NO.____

THERNTRON PRODUCTS, INC.
and LARRY DEAN NEWHARD DEFENDANTS

* * * * * * *

The Petition for Removal of the defendants, Therntron Products, Inc. and Larry Dean Newhard, and each of them, states as follows:

1. On the 9th day of April, 1973, an action was commenced by the above named plaintiffs against the above named defendants styled "Jay Lee Little and Lona Little, Plaintiffs vs. Therntron Products, Inc. and Larry Dean Newhard, Defendants", in the Pike Circuit Court, being Civil Action No. 14666, by service upon the defendants and each of them, such service being by substituted service on the Secretary of State of the Commonwealth of Kentucky, at or about the hour of 9:00 a.m., on April 10, 1973, and the Secretary of State notified these defendants and each of them, by mail, by letter dated April 10, 1973, mailing to these defendants and each of them the

summons and complaint, pursuant to and as provided for in Section 188.030, Kentucky Revised Statutes. Attached hereto and for the purposes of identification are said complaint, said summons, and letter from the Secretary of State, marked Exhibits "A", "B", and "C" in that order.

2. No further proceedings have been had in said action in the Pike Circuit Court by these defendants, or either of them, and/or by the plaintiffs other than the filing of said action and the service of summons thereon.

3. This Petition for Removal is being filed within thirty days from the date of service of summons upon these defendants, which service of summons on these defendants, by and through the Secretary of State, was had on April 10, 1973.

4. The above described action as shown by Exhibit "A" hereto attached, is a civil action of which this court has original jurisdiction under the provisions of Title 28 U. S. Code Section 1331, and is one which may be removed to this Court by the petitioners, these defendants, Therntron Products, Inc. and Larry Dean Newhard, pursuant to the provisions of Title 28 U. S. Code Section 1441, in that:

(a) The amount in controversy, exclusive of interest and costs, on the claim of each of the plaintiffs herein, separately, is in excess of Ten Thousand ($10,000.00) Dollars, each.

(b) The plaintiffs, Jay Lee Little and Lona Little, at all times hereinbefore mentioned, and now, are each citizens and residents of Pike County, Kentucky, within the Eastern District of the United States District Court.

(c) The defendant, Therntron Products, Inc. at the time of filing of the complaint herein, and now, is a foreign corporation, incorporated under the laws of the State of Indiana, is not a citizen and resident of the State of Kentucky, is a citizen and resident of the State of Indiana, is not a citizen and resident of any other state than Indiana, and is engaged in the business of manufacturing and selling at wholesale, and delivering the same by truck, the products of housing and building insulating materials; that said defendant's principal office and place of business is at Fort Wayne, Indiana, and that it has no other principal office and place of business in any other state than Indiana, and that it has no office or place of business, principal or otherwise, in the State of Kentucky; and is not incorporated under the laws of or in the State of Kentucky, and has no officers or directors residing in the State of Kentucky, and has no principal office and place of business in Kentucky; and that it is incorporated in only the State of Indiana, and no other state of the United States, and has no other principal office or place of business in any other state than Fort Wayne, Indiana, and that it has no officers or directors residing in the State of

Kentucky, and that it owns no property, real or personal, in the State of Kentucky.

(d) Petitioners state that the defendant, Larry Dean Newhard, was at all times hereinbefore mentioned, and is now, a citizen and resident of Bluffton, Indiana, residing at 326 North Marion Street, in said city, and that he is not a citizen or resident of any other state than Indiana; and that he is not a citizen or resident of the State of Kentucky.

5. The defendants, Therntron Products, Inc. and Larry Dean Newhard, and each of them, the petitioners herein, have filed herewith a Bond with good and sufficient surety, conditioned as provided by Title 28, U. S. Code, Section 1446 (d), that it will pay all costs and disbursements incurred by reason of the removal proceedings herein brought, should it be determined that this action is not removable, or was improperly removed.

WHEREFORE, the petitioners, the defendants herein, Therntron Products, Inc. and Larry Dean Newhard, and each of them, pray that the above action now pending against them in the Pike Circuit

Court, Pikeville, Kentucky, be removed therefrom to this Court.

LANDRUM, PATTERSON & DICKEY
201 Security Trust Building
Lexington, Kentucky

BY: s/ Frank G. Dickey, Jr.
Attorneys For Defendants

(Jurat Omitted in Printing)

* * * * * * *

EXHIBIT "A"

FILED: April 3, 1973

PIKE CIRCUIT COURT
DIVISION#_____

ACTION #14666

JAY LEE LITTLE and
LONA LITTLE — PLAINTIFFS

VS: — COMPLAINT

THERNTRON PRODUCTS, INC., and
LARRY DEAN NEWHARD — DEFENDANTS

* * *

Come the plaintiffs, Jay Lee Little and Lona Little, and for their cause of action against the defendants, state:

1. That the plaintiffs, at all times hereinafter mentioned, were and still are, citizens and residents of Pike County, Kentucky.

2. That at all times hereinafter mentioned, the defendant, Larry Dean Newhard, was an employee of the defendant, Therntron Products, Inc., and a citizen and resident of Indiana, residing at 326 North Marion, Bluffton, Indiana, that the address of

Therntron Products, Inc. is P. O. Box 9146, Fort Wayne, Indiana.

3. That the defendant, Therntron Products, Inc., is a corporation created and existing under the laws of one of the States of the United States of America, as to the exact one plaintiff has no information; that at all times hereinafter mentioned, said defendant was doing business in the State of Kentucky, and had no designated process agent in this State; that the defendants, Therntron Products, Inc., and Larry Dean Newhard, by accepting the privileges extended by the laws of the Commonwealth of Kentucky to operate motor vehicle within the State have designated as their personal representative for service of process, the Secretary of State of the Commonwealth of Kentucky, in accordance with KRS 188.020.

4. That on or about November 17, 1972, at or near Wales, Pike County, Kentucky, the plaintiff, Jay Lee Little, was operating his motor vehicle, 1966 Chevrolet, in a careful and prudent manner, upon a public highway, Kentucky 122, two miles west of Wales, Kentucky, in a westerly direction; that while the plaintiff, Jay Lee Little, was so operating said motor vehicle at said time and place, the plaintiff, Lona Little, was a passenger in said motor vehicle aforementioned.

5. That at said time and place, the defendant, Larry Dean Newhard, was operating a motor vehicle,

1969 Mack Truck, belonging to the defendant, Therntron Products, Inc., as an employee of the defendant, Therntron Products, Inc., in an easterly direction, in a negligent and careless manner, upon said public highway, Kentucky 122, and as a result thereof caused said motor vehicle to collide, run into, upon and against the motor vehicle then and there being operated by the plaintiff, Jay Lee Little.

6. That at all times hereinabove mentioned, the defendant, Larry Dean Newhard, was operating said truck in the course and scope of his employment with the defendant, Therntron Products, Inc.

7. That as a result of the accident which occurred in the manner aforesaid, the plaintiff, Jay Lee Little, received divers cuts, bruises, broken bones and injuries, and suffered both great physical and mental pain and permanent injuries, and as a result thereof the plaintiff had to expend and will continue to expend large sums of money for doctor, medical and nursing care, and in addition, said plaintiff has lost wages, all to his damage in the amount of $100,000.00.

8. That as a result of the accident which occurred in the manner aforesaid, the plaintiff's, Jay Lee Little's motor vehicle aforementioned, was damaged so that the difference in the fair cash market value immediately before and after said accident, was and is the sum of $1000.00.

9. That as a result of the accident which occurred in the manner aforesaid, the plaintiff, Lona Little, received divers cuts, bruises, broken bones and suffered both great physical and mental pain and permanent injuries, and as a result thereof the plaintiff had to expend, and will continue to expend, large sums of money for doctor, medical and nursing care, all to her damage in the amount of $100,000.00.

WHEREFORE, plaintiffs, Jay Lee Little and Lona Little, demand judgment against the defendants, jointly and severally as follows:

1. That the plaintiff, Jay Lee Little, recover of the defendants, jointly and severally, the sum of $101,000.00.

2. That the plaintiff, Lona Little, recover of the defendants, jointly and severally, the sum of $100,000.00.

3. That plaintiffs recover of the defendants their costs herein expended, and any and all other relief to which it may appear that each be entitled.

4. Plaintiffs demand a trial by jury.

KELSEY E. FRIEND
LAW FIRM
ATTORNEYS FOR PLAINTIFF
PIKEVILLE, KENTUCKY

BY: s/ R. Roland Case
Of Counsel

* * * * * * * *

(TITLE OMITTED IN PRINTING)

ANSWER

The defendants and each of them, for answer herein state as follows:

FIRST DEFENSE

These defendants and each of them specifically deny each and every allegation contained in the complaint except paragraphs 1 and 2 thereof, and paragraph 6 thereof, each of which is specifically admitted.

SECOND DEFENSE

These defendants and each of them state that upon the occasion complained of the plaintiffs and each of them were guilty of negligence which contributed to cause and bring about the injuries and damages sustained by them and each of them.

THIRD DEFENSE

These defendants and each of them state that upon the occasion complained of the accident of which the plaintiffs complain was caused and brought about by the sole negligence of the plaintiff, Jay Lee Little, and these defendants and each of them rely upon the same as a bar to the cause of action of each of the plaintiffs herein.

WHEREFORE, the defendants and each of them demand that the complaint herein be dismissed, for their costs, and for trial by jury herein.

LANDRUM, PATTERSON &
DICKEY
201 Security Trust Building
Lexington, Kentucky

BY: s/ Frank G. Dickey, Jr.
Attorneys for Defendants

(Certificate Omitted in Printing)

* * * * * * *

FILED: February 5, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1723

JAY LEE LITTLE and
LONA LITTLE, PLAINTIFFS,

VS: **ORDER**

THERNTON PRODUCTS, INC., and
LARRY DEAN NEWHARD, DEFENDANTS.

It appearing to the Court that the above styled action was removed from the Pike Circuit Court, Pike County, Kentucky on April 30, 1973 pursuant to the provisions of 28 U.S.C. §1446, and the Court having reviewed the entire civil docket and finding that there is no available time in which to try the above styled action in the foreseeable future and being advised that an adjudication of the merits contained herein would be expedited in the Pike Circuit Court, Pike County, Kentucky, and being advised,

IT IS ORDERED that the defendant herein show cause within ten (10) days from this date as to why the ends of justice do not require this matter be

remanded to the Pike Circuit Court, Pike County, Kentucky.

IT IS SO ORDERED this 5 day of February, 1974.

s/ H. David Hermansdorfer
H. David Hermansdorfer, Judge

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By: s/ Mary F. Blalock, D. C.

* * * * * * * *

(Title Omitted in Printing)

OBJECTIONS TO REMANDING AND MEMORANDUM

The defendants, and each of them, by counsel, in response to order of this Court dated February 5, 1974, object to the remanding of this case to the Pike Circuit Court upon the following grounds and for the following reasons:

1. This is an action between citizens of different states, as shown by the petition for removal herein, and this Court has jurisdiction under Article III of the Constitution of the United States, and by reason of 28 USC 1332, 28 USC 1441(a), and that a remanding of this case to the Pike Circuit Court would deprive these defendants and each of them of their constitutional rights under the United States Consitution, and of their statutory rights granted to them by acts of Congress above mentioned.

2. These defendants would not have removed this case to the United States District Court if these defendants thought or had reasons to believe that they could receive a fair and impartial trial in the Pike Circuit Court, and these defendants continue to so believe their interest can best be served by insisting upon the jurisdiction of the United States District Court for the Eastern District of Kentucky.

3. That no legal grounds exist upon which this Court can exercise discretion to remand the case to

the Pike Circuit Court, and in fact, this Court has no discretion to remand since there is no appearance that the case was removed in the first place improvidently and without jurisdiction. 28 USC Section 1447(c).

The defendants state, that in support of the foregoing objections to remanding that Article III, Section 2, of the Constitution of the United States provides that the judicial power of the United States shall extend, *inter alia* to controversies "between citizens of different states. . ." (Moore's Federal Practice Volume I, Section 0.71 [i], at page 701.10).

The Constitution itself has established national tribunals for decisions of controversies between citizens of different states. *Bank of the United States* v. *Deveaux*, (1809) 5 Cranch 61, 87, 3 L. Ed. 38. Moore's Federal Practice Volume 1, Section 0.71 [e.1], at page 701.22.

Citizens of different states are also citizens of the United States, and they ought to be able to litigate their controversies in a tribunal of the sovereign to which they both belong (Hamilton, The Federalist No. 80, Colonial Press 1901, page 440-441).

As stated by Professor Moore, Moore's Federal Practice, Volume 1, Section 0.71 [3.-2], at page 701.34:

> If delay in the federal courts has become excessive as it no doubt has in many places, remedies should be sought which strike at the cause of the delay and which do more than

> merely relocate the problem in the state courts. The whittling away or surrender of diversity jurisdiction, or of any other part of the federal jurisdiction which serves a legitimate function under the constitution, only weaken the federal system under which we have long prospered and, with, fair success, have done justice between disputants."

As to the point that this Court lacks discretion to remand this case, in the case of *Vann* v. *Jackson*, 165 F. Supp, 377 (E.D.N.C. 1959), District Judge Stanley stated:

> "It is concluded that where Congress has provided both a state and a federal forum and has further provided for actions first brought in the state court to be removed to the federal court, no discretionary power exists to remand the case to the state court."

Also see the decision of District Judge Larkins, in *Davis* v. *Joyner*, (E.D.N.C., 1964) 240 F. Supp. 689.

Also see the well reasoned opinion of our own Judge H. Church Ford in the case of *Larkin* v. *Roseberry* (E.D.Ky., 1944) 54 F. Supp. 373. In that case an action was brought in the Fayette Circuit Court, reviewing a decision concerning tobacco marketing quotas. The proceeding was removed to the United States District Court at Lexington upon the ground that it was a suit of a civil nature arising under a law of the United States. The plaintiff moved

to remand to the state court. In denying the motion to remand Judge Ford ably reasoned that a dissatisfied farmer may select the court in which to institute the proceeding (whether state court or federal court) but that this right of the plaintiff to select the court of first instance is not different from that which prevails in all cases where jurisdiction of the federal and state courts is concurrent. He further held that the right of a plaintiff to choose, between courts of concurrent jurisdiction, the form in which to institute his action, should not be held to negative the right of removal for otherwise the removal statute would not be operative in any case.

In the case at bar the plaintiff chose to sue the non-resident defendants in the state court. The non-resident defendants choose to remove it to federal court. To remand merely because of a crowded docket disposes of the defendants' constitutional and statutory right to removal in the first place. In determining whether or not this court can remove because this court is of the opinion that the "ends of justice" require such, this court should examine whether it has the discretion to do so in the first place. If the discretion does not exist, then the right to remand does not exist.

Respectfully submitted,

LANDRUM, PATTERSON &
DICKEY
201 Security Trust Building
Lexington, Kentucky

BY: s/ FGDJ
Attorneys for Defendants

(Certificate Omitted in Printing)

* * * * * * * *

FILED: March 22, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1723

JAY LEE LITTLE and
LONA LITTLE, PLAINTIFFS,

VS: **MEMORANDUM OPINION AND ORDER**

THERNTRON PRODUCTS, INC.
and LARRY DEAN NEWHARD, DEFENDANTS.

See Petition For Writ of Certiorari, Appendix, p. 3a.

* * * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THERMTRON PRODUCTS, INC.
(erroneously sued as Therntron Products, Inc.)
AND LARRY DEAN NEWHARD PETITIONERS

VS.

HON. H. DAVID HERMANSDORFER,
UNITED STATES DISTRICT JUDGE
FOR THE EASTERN DISTRICT
OF KENTUCKY RESPONDENT

PETITION FOR WRIT OF MANDAMUS
AND/OR PETITION FOR
WRIT OF PROHIBITION NO._____

TO THE HON. UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT:

* * * * * * * *

Petitioners, Thermtron Products, Inc., (erroneously sued as Therntron Products, Inc.), and Larry Dean Newhard, respectfully state that the jurisdiction of the United States District Court For The Eastern District of Kentucky, At Pikeville, has been erroneously, wrongfully, and without any authority, whatsoever, taken from these Petitioners, contrary to

and in denial of the Statutory, Constitutional and Civil Rights of these Petitioners. Petitioners further state that Civil Action No. 14666, filed in the Pike Circuit Court, Pike County, Kentucky, styled Jay Lee Little and Lona Little, Plaintiffs, vs. Therntron Products, Inc. and Larry Dean Newhard, Defendants, was properly removed to the United States District Court for the Eastern District of Kentucky, at Pikeville, subsequent to which said Court took and exercised jurisdiction over the subject matter and the parties to said action, on or about April 30, 1973, the properly removed case was assigned Civil Action No. 1723, in the United States District Court for the Eastern District of Kentucky, at Pikeville. Respondent herein, on March 22, 1974, entered an Order remanding said action to the Pike Circuit Court, even after the Respondent admitted and conceded that the action had been properly removed and that the United States District Court had jurisdiction over the subject matter and the parties all of which appears more fully as hereinafter set forth:

STATEMENT OF FACTS

1. On April 9, 1973 an action was commenced by Jay Lee Little and Lona Little, Plaintiffs, against these Petitioners in the Pike Circuit Court, Pike County, Kentucky being Civil Action No. 14666, a Court of competent jurisdiction, by issuance of summons, which was served upon these Petitioners by substituted service upon the Secretary of State of

the Commonwealth of Kentucky, on April 10, 1973, a copy of which Complaint, summons, and notification from the Secretary of State are attached hereto and made a part hereof and designated for the purposes of reference thereto as Exhibits "A", "B", and "C", respectively.

2. That under Certificate of Service dated April 26, 1973, Notice of Removal was given to the plaintiffs and counsel for the plaintiffs, Jay Lee Little and Lona Little, and to the Pike Circuit Court Clerk, and on or about April 26, 1973 these Petitioners filed a Petition and Bond for Removal in the United States District Court for the Eastern District of Kentucky, at Pikeville, a copy of which Petition and Bond for Removal are attached hereto and made a part hereof and designated for the purposes of reference as Exhibits "D", "E", respectively.

3. That under Certificate of Service dated April 26, 1973 these Petitioners filed an Answer to the Complaint of the plaintiffs, Jay Lee Little and Lona Little, in Civil Action No. 1723 in the United States District Court for the Eastern District of Kentucky, at Pikeville, which pleading and answer is attached hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "F".

4. That said removal of the above action and said filing of the responsive pleading or answer was done by counsel for these Petitioners at their specific request and in accord with the Statutory,

Constitutional, and Civil Rights and desires of these Petitioners.

5. That the Respondent has admitted and conceded that the Petitioners properly removed the above action from the Pike Circuit Court to the United States District Court for the Eastern District of Kentucky, at Pikeville, being Civil Action No. 1723 and styled Jay Lee Little and Lona Little, plaintiffs, against Therntron Products, Inc. and Larry Dean Newhard, Defendant, which removal has been noted by the Respondent herein as having been properly effected on April 30, 1973.

6. That the plaintiffs, Jay Lee Little and Lona Little, have never objected nor moved the Respondent for any Orders with respect to the proper removal of this action or with regard to the jurisdiction exercised by the Respondent herein and said Plaintiffs have remained silent throughout all proceedings.

7. That the Respondent recognized, assumed, and exercised jurisdiction, as required, over the subject matter and the parties with respect to Civil Action No. 1723 in the United States District Court for the Eastern District of Kentucky, at Pikeville.

8. That under Certificate of Service dated January 28, 1974, these Petitioners served notice to take the depositions of the plaintiffs, Jay Lee Little and Lona Little, and a copy of which is attached

hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "G".

9. That the Respondent herein entered an Order in Civil Action No. 1723 in the United States District Court for the Eastern District of Kentucky, at Pikeville, on February 5, 1974, wherein the Respondent acknowledged, admitted and respected the fact that these Petitioners have properly removed said action pursuant to the provisions of 28 U. S. C. §1446 and wherein the Respondent arbitrarily and without authority required these Petitioners to "show cause" within ten days as to why said action should not be remanded to the Pike Circuit Court, which Order was and is void, and which Order is attached hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "H".

10. That these Petitioners, under Certificate of Service dated February 11, 1974, timely filed Objections and Response to the Order (Exhibit "H") of the Respondent, a copy of which is attached hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "I".

11. That the Petitioners took the depositions of the plaintiffs, Jay Lee Little and Lona Little, on February 21, 1974, which depositions were not transcribed and certified by the Court Reporter until March 27, 1974.

12. That on March 22, 1974 the Respondent herein entered a Memorandum, Opinion and Order

remanding Civil Action No. 1723 in the United States District Court For The Eastern District of Kentucky, at Pikeville, to the Pike Circuit Court, wherein the Respondent conceded the Right of these Petitioners to remove said action from the Pike Circuit Court, where the provisions of 28 U. S. C. §144l, et. seq. were properly followed, a copy of which Memorandum, Opinion and Order is attached hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "J".

13. These Petitioners believe, upon information only, that the Respondent herein has entered similar Orders of Remand in approximately 28 other actions, which actions either were removed to the United States District Court for the Eastern District of Kentucky, at Pikeville, in 1973, or which actions constitute all cases removed to said Court during the year 1973.

14. That this Petition for Writ of Mandamus and/or Writ of Prohibition directs itself to an apparent case of first impression, with regard to all pertinent issues.

15. That these Petitioners are entitled to all extraordinary relief pursuant to 28 U. S. C. §1651 and Rule 21 of the Rules of Appellate procedure, and have no apparent remedy by direct appeal.

STATEMENT OF ISSUES

1. Whether the action of the Respondent, in remanding Civil Action No. 1723 in the United States District Court, for the Eastern District of Kentucky, at Pikeville, to the Pike Circuit Court, Pike County, Kentucky, ignored and violated the mandatory and unambiguous provisions of 28 U. S. C. 1441, et. seq. which action was so arbitrary, unauthorized, and clearly erroneous so as to deprive these Petitioners of their statutory rights pursuant to 28 U. S. C. §1332 and 28 U. S. C. §1441, et. seq., their Constitutional Rights provided by Article III, §2 of the Constitution of the United States and guaranteed these Petitioners by the Fourteenth Amendment to the Constitution of the United States, and their Civil Rights.

2. Whether the Respondent has any authority whatsoever or any discretion to divest the United States District Court for the Eastern District of Kentucky, at Pikeville, of jurisdiction over the subject matter and parties in Civil Action No. 1723, docketed therein, where it is the mandatory duty of the Respondent herein to retain and exercise jurisdiction, where the Pike Circuit Court was a Court of competent jurisdiction and where the Pike Circuit Court was a Court of competent jurisdiction and where the above action, as conceded by the Respondent, was admittedly removed properly pursuant to the requirements of 28 U. S. C. 1441, et. seq., which jurisdiction has never been challenged, and where there was no improvident removal by these Petitioners.

3. Whether the right to remove the above action to the United States District Court for the Eastern District of Kentucky, at Pikeville, was the exclusive right of these Petitioners, pursuant to the aforementioned Statutory and Constitutional Provisions, which right may not be substantively and procedurally denied these Petitioners by the unauthorized and void act of the Respondent herein, and which right may not be "balanced" weighed or otherwise by the Respondent against other discretionary considerations.

STATEMENT OF GROUNDS UPON WHICH WRIT SHOULD BE ISSUED

The reasons the Writ of Mandamus and/or Writ of Prohibition should be granted and issued, based upon the aforementioned facts, are plain and obvious.

Article III, §2 of the Constitution of the United States provides that the Judicial power of the United States shall extend to controversies "between citizens of different states." The aforementioned action is one between citizens of different states, which was properly removed to the United States District Court for the Eastern District of Kentucky, at Pikeville, pursuant to 28 U. S. C. 1441, et. seq.

As stated in Moore's Federal Practice, Volume 1, §0171 [3.-2] at page 701.29:

> "Despite frequent agitation to eliminate or curtail jurisdiction especially in light of the ever increas-

ing work load of the Federal Courts, diversity continues to provide a foundation for a substantial part of the cases in the lower Federal Courts. From the foundation of the Republic and during the ensuing years, the lower Federal Courts have been a cohesive force, during both quiet and tumultuous times, holding this Nation together under the binding principles of Justice under law. ***local Courts alone cannot resolve the conflicts and lead the way.***

***the Constitution envisions a working partnership between the State and Federal Courts under which each forum may enforce the law of the other sovereign when it is deemed appropriate *If delay in the Federal Courts has become excessive, as it no doubt has in many places, remedies should be sought which strike at the cause of the delay and which do more than merely relocate the problem in the State Courts. The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal jurisdiction which serves a legitimate function under the Constitution, only weakens the Federal System under which we have long prospered and, with fair success, have done justice between disputants.*" (emphasis added).

Respondent has ignored and violated the mandatory and unambiguous provisions of 28 U. S. C. 1441. The Respondent has no authority, whatsoever, nor any discretion to divest the United States District Court for the Eastern District of Kentucky, at Pikeville, of jurisdiction over the

subject matter and parties, where the Petitioners have an exclusive right to remove the aforementioned action, and where said action was properly removed.

Certainly, the provisions of 28 U. S. C. 1441, et. seq. are clear and unambiguous. The Petitioners, as admitted and conceded by the Respondent herein, properly followed the procedures set forth therein. Furthermore, the Respondent exercised jurisdiction from April 30, 1973 and still has jurisdiction over the subject matter and parties.

It is stated in *Mach-Tronics, Incorporated* vs. *Zirpoli,* (Ninth Circuit) 316 F. 2d 820 (1963), at page 824, as follows:

> "It has long been recognized that when a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. (Citations omitted). It has also been considered to be the rule that when a Federal Court is presented with a case of which it has cognizance it may not turn the matter over for adjudication to the State Court. . . ."

It is therefore, submitted that it is the mandatory duty of the Respondent herein to retain and exercise jurisdiction, in the aforementioned action.

It was the exclusive right of these Petitioners to remove the action to the United States District Court for the Eastern District of Kentucky, at Pikeville.

There is no discretionary power whatsoever, to remand this case to the State Court. Therefore, the Writ of Mandamus and/or Writ of Prohibition sought herein should be granted.

In *Travelers' Protective Association* vs. *Smith,* (Fouth Circuit) 71 F. 2d 511 (1934), an action was instituted by Citizens of North Carolina, in a Court of that State, against a Citizen of the State of Missouri. The action was duly removed to Federal Court on the ground of diversity of Citizenship. In the Travelers', case, the propriety of the removal was never challenged, which is the identical situation in the within action. However, after the Defendant had answered, the plaintiffs filed a written waiver of their right to recover in the amount in excess of $3,000.00 and remitted to the defendant any excess. The Plaintiffs then moved that the cause be remanded to the State Court upon the ground that such remittitur had been filed. The Judge entered an Order remanding the case on that ground, *without finding that it had been improperly removed into the Federal Court and without anything appearing of record to show that the removal was in any wise improper.* (emphasis added). The Defendant appealed from the Order remanding the case and asked leave to file a Petition for a Writ of Mandamus. The Court in the *Travelers,* case, stated, at page 512, that "[T]he action . . . was properly removed into the Federal Court and the jurisdiction of that Court attached." The

Court further stated that no appeal lies from the Order remanding the case to the State Court, for the reason that it is not a final judgment, however, in the absence of Statute, Mandamus is an appropriate remedy to require the trial Court to hear and decide a case which it has improperly remanded. The Court further stated, at page 12, as follows:

> It is clear that the effect of this statutory provision [28 U.S.C. §1447 (previously §71)] is to forbid appellate review of an order remanding a case when the District Court shall decide that the cause was improperly removed! ***But where, as here, it clearly appears that the order was made, not because the Court decided that the cause had been improperly removed, but because of a remittitur entered after it had admittedly required jurisdiction, we do not think that either the word or the spirit of the Statute prevents our directing that it proceed to exercise that jurisdiction by hearing and deciding the case.
>
> ***In none of the cases which we have been able to find has it been held that the effect of the Statute is to deprive the appellate Court of the power to require the Trial Court to hear and decide a case which has been properly removed, and which has been remanded solely on the ground of action taken subsequent to removal which did not affect jurisdiction.
>
> If the provision of Section 28. . . be construed as forbidding review of an Order of Remand in a case such as this, a party in the situation of the

> defendant here will be without remedy. . . . We do not think that it was the intention of Congress that a party entitled to invoke the Federal Jurisdiction should be without remedy if the Court, without a finding expressed or implied of improper removal should remand the case to the State Court on a ground arising after removal and not affecting jurisdiction. Certainly, we do not find in the Statutes any evidence of such intention.
>
> ***Leave will be granted defendant to file a Petition for Writ of Mandamus requiring the Court below to hear and determine the case. It will probably not be necessary for defendant to file such Petition, as the learned Judge may of his own Motion vacate the Order remanding the case and proceed to hear and decide it."

It is, therefore, respectfully submitted that a Writ of Mandamus be issued. *In Re La Providencia Development Corporation,* (First Circuit) 406 F. 2d 251 (1969); *Holub Industries, Inc.* vs. *Wyche,* (Fourth Circuit) 290 F. 2d 852 (1961).

WHEREFORE, Petitioners, Thermtron Products, Inc., (erroneously sued as Therntron Products, Inc.) and Larry Dean Newhard, pray that this Court require and compel the Respondent, Hon. H. David Hermansdorfer, to show cause why a Writ of Mandamus should not be issued, commanding said respondent to set aside the void Order of Remand and retain jurisdiction of Civil Action No. 1723 in the

United States District Court for the Eastern District of Kentucky at Pikeville.

WHEREFORE, Petitioners, Thermtron Products, Inc. (erroneously sued as Therntron Products, Inc.) and Larry Dean Newhard pray that this Court prohibit and forbid the Respondent, Hon. H. David Hermansdorfer, from entering the void Order of Remand and divesting the United States District Court for the Eastern District of Kentucky at Pikeville, of jurisdiction over the subject matter and parties in Civil Action No. 1723, and further prohibit and forbid the Respondent herein from abdicating the mandatory duties, obligations, and responsibilities as Judge in said action.

Respectfully submitted,

FRANK G. DICKEY, JR.
LANDRUM, PATTERSON & DICKEY
201 Security Trust Building
Lexington, Kentucky 40507

BY: s/ Frank G. Dickey, Jr.
Attorneys For Petitioners

(Certificate Omitted in Printing)

* * * * * * *

(Title Omitted in Printing)

RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION

Mandamus does not lie to review an order remanding a case to the State Court. 28 U.S.C. 1447(d); *U.S.* v. *Rice,* 327 U.S. 742, 751 (1946); *In Re Pennsylvania Co.,* 137 U.S. 451 (1890). The statutory limitation, "An order remanding . . . is not reviewable on appeal or otherwise . . ." of 28 U.S.C. 1447(d) has been construed by this Circuit to exclude Mandamus. *Stein's Stores* v. *Taylor,* 216 F.2d 439 (6th Cir. 1954).

Although petitioners have expertly set out their contentions, exception is taken specifically to the conclusion respondent had no discretion in the matter. The language of 28 U.S.C. 1447(c) states, in part:

> "(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. . . ."

The clause "was removed improvidently and without jurisdiction" is a logical non-sequitur if the word "and" is read as a conjunctive. If the court has no jurisdiction, all other considerations are irrelevant.

Only when read as a disjunctive can the word "and" be construed to give meaning to all of the statutory language. The adverb "improvidently" by definition involves a judgment as to the action taken and, at law, the making of such judgments is denominated as judicial discretion. Although petitioners denominate removal as a right[1], it was noted in *Shamrock Oil Corp.* v. *Sheets*, 313 U.S. 100, 106 (1940) by footnote 2 that it was considered a privilege by the House Committee. H.Rept. No. 1078, 49th Cong., 1st Sess., p. 1. The case of *In re La Providencia Development Corporation*, 406 F.2d 251, 252 (1st Cir. 1969) found removal to be a privilege.

In any event, only under the most dire circumstances should discretion be exercised to deny a federal forum on removal be it a limited right or privilege.

It is believed, notwithstanding the construction of 28 U.S.C. 1447(d), that a further statement of the issue should be made.

Disclaimer is made of any intent to reduce the numerical case load of respondent. The intent

1. Where concurrent state and federal jurisdiction exist by Act of Congress, removal as a matter of right exists and discretion does not exist. However, this proceeding does not invoke concurrent jurisdiction but arises under 28 U.S.C. 1332. Cf. *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 244-245 (1970).

motivating the Show Cause procedure was to afford civil litigants a trial in an appropriate forum. There is no foreseeable trial time available for civil jury cases on the calendars of respondent's several divisions. The decision to remand involved a consideration of the following factors.

At the time the docket analysis was made of the civil cases hopelessly awaiting trial, respondent had concluded the performance analysis for his courts for the calendar year 1973 these figures showed, in summary:

Cases pending 1/1/73	575
Final orders entered during 1973	594
Cases pending 12/31/73	557

The illness of the Chief Judge of the Eastern District of Kentucky necessitated respondent assuming for an indefinite period the criminal side of the London Division which carried, at the time the planning decision was made, in excess of sixty-five (65) criminal matters. Further, among the pending matters for which respondent is chargeable are five (5) protracted cases. Three (3) of these cases had previously been brought to the attention of the Hon. Harry Phillips, Chief Judge, Sixth Circuit Court of Appeals by letter dated January 11, 1974, who promptly brought them to the attention of the Intercircuit Assignment Committee. To date respondent has not been advised of any affirmative action. A

significant planning factor was the projection of Justice Department Attorneys that four thousand (4,000) Black Lung claims arising under Part B of the Coal Mine Health and Safety Act, 30 U.S.C. 901, had been rejected at the administrative level and were expected to be filed in the Eastern District of Kentucky seeking judicial review; and almost four hundred (400) Part A safety violations, civil, were in the United States Attorney's office at Lexington, Kentucky for filing. The Black Lung cases are deemed to be within the priority directive of *Webb* v. *Richardson,* 472 F.2d 529, 538 (6th Cir. 1972). Finally, inquiry established that the Pike County Circuit Court has two (2) excellent judges and no back log in excess of one (1) year.

In this context, a case by case analysis was made of pending civil cases. In the group of removal cases those depending on pure diversity, 28 U.S.C. 1332, were identified and on respondent's own motion orders were entered to show cause why the cases should not be remanded. In all cases where any suggestion of local prejudice or factual cause was made, the cases were retained.

The instant case is a pure diversity case for personal injuries, pain and suffering arising out of an automobile accident. No permanent injury is alleged or is any impairment of the ability to earn money involved. The defendants responded on the basis of right to have their case tried in the United States District Court at Pikeville.

Under any circumstances except the most chronic, the radical procedure invoked in this instance would not have been considered. It is the respondent's belief that a trial judge has an affirmative duty to exercise discretion in the management of dockets in basic fairness to the litigants. There is no doubt merit in defendants' argument of being in federal court as a matter of right, but that does not outweigh the plaintiffs' right to have a reasonably timely trial. The practice in the Eastern District of Kentucky since about 1968 has been for defendants, excluding, of course, petitioners in this matter, to remove cases from State Court in the perfect assurance that no trial time would be available in the foreseeable future. There is no residual fairness in this practice. Accordingly, and with cases of superior priority pending, respondent has undertaken since January 1974 to give relief to the civil docket. The consequence predictably has been an accumulation of criminal matters which no longer may be deferred. At this writing respondent has pending one hundred and forty four (144) criminal cases which have been culled for pleas. Considering that the Eastern District of Kentucky has the sixth highest weighted filing per judge in the United States in Criminal cases, the conclusion is made that for the foreseeable future measured in years, not months, there will be no available jury trial time for non-priority civil cases.

Respondent respectfully declines to request any specific relief under the circumstances.

This the 18 day of April, 1974.

s/ H. David Hermansdorfer
H. David Hermansdorfer
United States District Judge
Eastern District of Kentucky

Respondent

(Certificate Omitted in Printing)

* * * * * * *

(Title Omitted in Printing)

MEMORANDUM OF SUPPLEMENTAL AUTHORITIES

MAY IT PLEASE THE COURT:

Come the Petitioners, Thermtron Products, Inc. (erroneously sued as Therntron Products, Inc.) and Larry Dean Newhard, by counsel, and for Memorandum of Supplemental Authorities, in support of the Petition for Writ of Mandamus and/or Petition for Writ of Prohibition, and state as follows:

This Court stated in *Direct Transit Lines* vs. *Local Union, No. 406* (6th Cir. 1952) 199 F. 2d 89 that a cause, removed to District Court, should not be remanded if it were properly removable upon the record as it stood at the time of the filing of the petition for removal. In the within action, the Respondent conceded that this action was properly removed. Therefore, the Order of Remand was improper and void. Although the *Direct Transit Lines* case, was distinguished in *Hat Corp. of America* vs. *United Hatters, etc.* (D. C. Conn.) (114 F. Supp. 890 (1953)), upon the grounds that the Court's attention was principally focused on the propriety of remedy by mandamus, the proposition that a case should not be remanded if properly removed still stands.

Respondent's Order of Remand was based primarily upon the discretionary consideration of

balancing the statutory rights of the Petitioners herein to remove the case from the Pike Circuit Court against the equitable consideration of affording the Plaintiffs an early trial date. This consideration does not constitute grounds for remand of a case properly removed by the Petitioners.

There is no discretionary power to remand a case to State Court. In *Vann* vs. *Jackson,* (E. D. N. Car.) (165 F. Supp. (1958)), the Court stated as follows, at pages 380-381:

> "[T]he proposition has been advanced that the Court has discretionary power to remand this case to the state Court, eventhough properly removed to the federal court. In considering this question, the Court must exercise care to determine that a discretionary power does exist, and that it will be in the interest of Justice to exercise such discretion.
>
> * * * since there is no means for reviewing an Order remanding a case to a state court, the court should act with caution in determining whether or not a power to remand exists. (citation omitted) The Court is without power to remand if no discretionary power exists.
>
> * * * It is concluded that where Congress has provided both a state and a federal forum, and has further provided for actions first brought in the state Court to be removed to the federal Court, *no discretionary power exists to remand the case to the state Court.*" (emphasis added)

In *Davis* vs. *Joyner,* (E. D. N. Car.) (240 F. Supp. 689 (1964)), the identical question presented in the case of *Vann* vs. *Jackson, supra,* and *Larkin* vs. *Roseberry,* (E. D. Ky.) (54 F. Supp. 373 (1944)), was brought before the District Court. The Court, stated, at page 691, that the Court's authority to remand is found in Title 28 U. S. C. §1447 (c) and provides that the District Court shall remand if "it appears that the case was removed improvidently and without jurisdiction." It was held that this was certainly not the case in that instance, and it is certainly not the case, in the within action. In *Davis* vs. *Joyner, supra,* the Court held that no discretionary power exists to remand the case to the state Court.

Although the Respondent takes exception, from a semantic stand point, to this principle, it is clear that the respondent had no discretion to remand this case. Were it otherwise, 28 U. S. C. §1441 et. seq. would be rendered ineffective. Also, the same would constitute repeal of the Statute by implication, which is not favored. *Larkin* vs. *Roseberry,* (E.D. Ky., 54 F. Supp. 373 (1944)). Furthermore, the Respondent had no discretion to remand the instant case to afford the plaintiffs an earlier trial date. In *Romero* vs. *ITE Imperial Corporations,* (D. C. Puerto Rico) (332 F. Supp. 523 (1971)), and action was originally brought by the plaintiff in the Superior Court of Puerto Rico. A timely petition for removal was filed on January 19, 1971. The varified petition for removal alleged that the basis of the petition was the existence of

total diversity between the properly named parties. On July 7, 1971, the plaintiff filed a Motion to Remand. One of the primary issues was "whether the case should be remanded." The Court stated, at page 526, as follows:

> "The right to remove an action from a state court to the federal district court is a *statutory* right and it is a right that has existed since the original Judiciary Act of 1789. (citations omitted). The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants. (citation omitted)
>
> *Plaintiff's argument to the effect that a remand would speed up the proceedings in this case and would therefore be in the interest of justice is not correct * * * once the statutory requirements for the right of removal have been met, this Court cannot order a remand on discretionary grounds such as the alleged speedier trial to be afforded the plaintiff."* [*emphasis added*].

It is, therefore, submitted that the Petitioners had a statutory right to remove the within action. Furthermore, it is apparent that there was not discretion afforded the Respondent to order a remand, particularly upon the grounds stated.

The right of removal is a valuable right. *Muller* vs. *Lyke Coastwise Line,* (S. D. Texas) (144 F. Supp. 135 (1940)). "While the plaintiffs had a right to choose initially the state Court as the forum for this action, the defendants have a subsequent equal right to resort herein to the Federal Court by compliance with the removal statute, transferring indirectly original jurisdiction from the state to the Federal Court." (*Garland* vs. *Humble Oil & Refining Company,* E. D. Tenn.) 306 F. Supp. 608, 610 (1969). In *Gentle* vs. *Lamb-Weston, Inc.* (N. D. Main) 302 F. Supp. 161 (1969), the Court stated, at page 165, as follows:

> "While the plaintiff, in good faith, may proceed in the State Courts . . . *it is equally true that the Federal courts should not . . . prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts in proper cases, to retain their own jurisdiction.*" (emphasis added)

The statutory right of removal may be protected by issuance of the Writ sought by the Petitioners.

It has been stated by the Respondent that "In all cases where any suggestion of local prejudice of factual cause was made, the cases were retained, and that the defendants responded on the basis of right to have their case tried in the United States District Court at Pikeville." The Petitioners in objecting to

remanding the within action stated that "These defendants would not have removed this case to the United States District Court if these defendants thought or had reason to believe that they could receive a fair and impartial trial in the Pike Circuit Court." (Exhibit "H"). It has further been stated, by the Respondent, that "No permanent injury is alleged" by the plaintiffs, however, in Exhibit "A", both plaintiffs made allegations with regard to "permanent injuries." In this light, to single out cases for remand constitutes a denial of the statutory rights of the Petitioners. As stated in *Central of Georgia Railway Co.* vs. *Riegel Textile Corp.* (5th Cir. 1970) 426 F. 2d 935, 938:

> "There is a federal interest in seeing that the removal statute is applied uniformly to litigants in all states. As the Supreme Court said in *Shamrock Oil & Gas Corp.* vs. *Sheets*,
>
> > The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. (citation omitted)"

It is, therefore, submitted that where the Petitioners properly removed this action from the Pike Circuit Court, in accord with the statutory right afforded, there is no discretionary power to remand the instant case to the State Court. The valuable

right of the Petitioners must be protected by requiring the Respondent herein to retain and exercise jurisdiction, in entertaining the suit, considering the merits and rendering a binding decision thereon. *Food Basket* vs. *Amalgamated Meat Cutters, etc.* (W. D. Ky) 124 F. Supp. 463, 465 (1954) and *In re President and Fellows of Harvard College,* (First Cir. 1945) 149 F. 2d 69.

In conclusion, it should be stated that the Petitioners truly regret the existence of the current situation in the United States District Court for the Eastern District of Kentucky, at Pikeville. It should further be stated that these circumstances certainly cannot be deemed to reflect, in any regard, whatsoever, upon the abilities and performance of the Respondent herein, who has performed under extremely difficult circumstances, most ably and to his very best, during his tenure on the bench. Nevertheless, there are no grounds for abrogating the rights of the Petitioners and denying them jurisdiction of the United States District Court.

Respectfully submitted,

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BY:s/ Frank G. Dickey, Jr.

(Certificate Omitted in Printing)

* * * * * * *

FILED: Jun 4, 1974

No. 74-1410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THERMTRON PRODUCTS, INC.
and
LARRY DEAN NEWHARD, Petitioners

vs

HONORABLE H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, Respondent

ORDER

See Petition For Writ of Certiorari, Appendix, p. 1a

* * * * * * * *

Supreme Court, U. S.
FILED
DEC 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-206

THERMTRON PRODUCTS, INC. (Erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD .....PETITIONERS

VS:

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY....RESPONDENT

BRIEF OF JAY LEE LITTLE AND LONA LITTLE IN OPPOSITION

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IN THE

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BRIEF OF JAY LEE LITTLE AND LONA LITTLE IN OPPOSITION

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

We find no claim that the District Judge has violated any constitutional or fundamental right of Petitioners. Nor is it asserted that Petitioners will not receive a full day in court, with the right to appeal any denial of a fair trial. Petitioners concede a speedy trial in the state court with two able trial judges, perhaps better equipped to try this automobile negligence case involving solely state issues.

We must agree with the District Judge that Diversity

Removal Jurisdiction is a creature of the Congress, and it is thus necessarily subject to Congressional limitations. Here truly the Congress giveth and the Congress taketh away. And these limitations include the limitation on the right to appeal a remand order. 28 USC, section 1447(c) provides for remand and section 14447(d) denies the Circuit Courts of Appeal and this court jurisdiction of an appeal from a remand order. Simply stated, a remand order is not reviewable.

Petitioners seek to circumvent section 1447(d) by the mandamus and/or prohibition route. But Petitioners forget that the Sixth Circuit once sustained their position (109 F. 2d 72) only to have this court reverse in *Kloeb* v. *Armour and Co.*, 311 U.S. 199 (1940), saying at 204:

> "These sections were designed to limit possible review of orders remanding causes and thus prevent delay. *In re Pennsylvania Company*, 137 U.S. 451, 454. They entrust determination concerning such matter to the informal judicial discretion of the district court and cut off review."

To the same effect see *United States* v. *Rice*. 327 U.S. 742 (1945).

The District Judge, in his Response in the Court of Appeals, asserts he acted prudently based upon an "informed judicial discretion". Petitioners say he did not. We attach the Response in the Court of Appeals as an Appendix here. We do not take either position, or even discuss the respective merits. Instead, we say that to do so here would confer the right of appeal, a right expressly denied by the Congress.

The plain fact is the District Judge had jurisdiction to remand. 28 U.S.C. 1447(d). A district judge must exercise his "informed judicial discretion" in many facets of diversity removal. One who elects to remove must do so with the firm realization that the district court has jurisdiction to remand, from which no appeal will lie. And he must accept the denial of appeal, however erroneous the remand. Such is the narrow ambit of removal and remand, a matter of privilege and not of right.

The assertion, as a basis for review, that there exists a conflict in the decisions of the Courts of Appeal simply is not so. By 1940, the Fourth Circuit in *Travelers Protective Association of America* v. *Smith*, 71 F. 2d 511 (1934) and the Sixth Circuit in *Armour and Co.* v. *Kloeb*, 109 F. 2d 72 (1939) had held mandamus would lie where there was clearly no basis for remand. The Third Circuit had squinted in that direction in *Banker's Securities Corp.* v. *Insurance Equities Corp.*, 85 F. 2d 856 (1936), distinguishing on the basis that there the petition for removal had been improvidently denied and no remand had occurred. Thus, there was no diversity among the Courts of Appeals.

In 1940, this court settled the issue in *Kloeb* v. *Armour and Co.*, *supra*, reversing the Sixth Circuit. It was laid to rest in 1946 in *United States* v. *Rice*, *supra*. The Sixth Circuit, in *Stein Stores* v. *Taylor*, 216 F. 2d 439 (1954), was simply executing the mandate of this court in *Kloeb* and *Rice*. Explained, the "conflict between the circuits" quickly dissipates.

The will of the Congress is plain and supreme in this matter. The claim of Petitioners to an absolute right to a

federal forum addresses itself to the Congress and not this court.

CONCLUSION

On November 17, 1972, the Petitioners' tractor-trailer slid on a mountain curve into the automobile operated by Jay Lee Little. He and his wife were injured. Their case was filed in the state court, removed to the district court, lay inactive for a protoracted period with no prospect of trial, and was finally remanded to the state court. It was assigned for trial in October, 1974, but the trial date was vacated because of this Petition. And in Kentucky no interest is recoverable until jugdment, so the Littles continue to lose.

The mandamus proceeding in the Court of Appeals and this Petition have occasioned the very delay the Congress intended to avoid by denying appeal of remand orders.

We suggest this is an adminstrative matter, and it was so considered by the Sixth Circuit. We do not perceive it to be an administrative problem of such magnitude as to require granting a Writ of Certiorari and further delay the Littles in obtaining the justice which seems to be obtainable only in the state courts. The Petition should be denied.

Respectfully submitted,

C. KILMER COMBS
COUNSEL FOR
JAY LEE LITTLE and
LONA LITTLE

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Brief has been served upon the petitioners by mailing same to Hon. Frank G. Dickey, Jr., Landrum, Patterson & Dickey, 201 Security Trust Building, Lexington, Kentucky 40507, counsel for petitioners, and upon H. David Hermansdorfer, Respondent, Catlettsburg, Kentucky 41129, by mailing same to him, this 18 day of December, 1974.

C. Kilmer Combs

C. Kilmer Combs

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 74-1410

THERMTRON PRODUCTS, INC.
(erroneously sued as Therntron Products, Inc.)
AND LARRY DEAN NEWHARD, PETITIONERS

VS: RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION

HON. H. DAVID HERMANSDORFER,
UNITED STATES DISTRICT JUDGE FOR
THE EASTERN DISTRICT OF
KENTUCKY RESPONDENT

Mandamus does not lie to review an order remanding a case to the State Court. 28 U.S.C. 1447(d); *U.S.* v. *Rice*, 327 U.S. 742, 751 (1946); *In Re Pennsylvania Co.*, 137 U.S. 451 (1890). The statutory limitation, "An order remanding . . is not reviewable on appeal or otherwise . . .", of 28 U.S.C. 1447(d) has been construed by this Circuit to exclude Mandamus. *Stein's Stores* v. *Taylor*, 216 F. 2d 439 (6th Cir. 1954).

Although petitioners have expertly set out their contentions, exception is taken specifically to the conclusion respondent had no discretion in the matter. The language of 28 U.S.C. 1447(c) states, in part:

> "(c) If at any time before final judgment it appears that the case was removed improvidently and without

jurisdiction, the district court shall remand the case . . . ."

The clause "was removed improvidently and without jurisdiction" is a logical non-sequitur if the word "and" is read as a conjunctive. If the court has no jurisdiction, all other considerations are irrelevant. Only when read as a disjunctive can the word "and" be construed to give meaning to all of the statutory language. The adverb "improvidently" by definition involves a judgment as to the action taken and, at law, the making of such judgments is denominated as judicial discretion. Although petitioners denominate removal a as right[1], it was noted in *Shamrock Oil Corp.* v. *Sheets*, 313 U.S. 100, 106 (1940) by footnote 2 that it was considered a privilege by the House Committee. H. Rept. No. 1078, 49th Cong., 1st Sess., p. 1. The case of *In re La Providencia Development Corporation*, 406 F. 2d 251. 252 (1st Cir. 1969) found removal to be a privilege.

In any event, only under the most dire circumstances should discretion be exercised to deny a federal forum on removal be it a limited right or privelege.

It is believed, notwithstanding the construction of 28 U.S.C. 1447(d), that a further statement of the issue should be made.

Disclaimer is made of any intent to reduce the numerical case load of respondent. The intent motivating

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1. Where concurrent state and federal jurisdiction exist by Act of Congress, removal as a matter of right exists and discretion does not exist. However, this proceeding does not invoke concurrent jurisdiction but arises under 28 U.S.C. 1332. Cf. **Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 244-245 (1970)**

the Show Cause procedure was to afford civil litigants a trial in an appropriate forum. There is no foreseeable trial time available for civil jury cases on the calendars of respondent's several divisions. The decision to remand involved a consideration of the following factors.

At the time the docket analysis was made of the civil cases hopelessly awaiting trial, respondent had concluded the performance analysis for his courts for the calendar year 1973, these figures showed, in summary:

Cases pending 1/1/73 575
Final orders entered during 1973 594
Cases pending 12/31/73 557

The illness of the Chief Judge of the Eastern District of Kentucky necessitated respondent assuming for an indefinite period the criminal side of the London Division which carried, at the time the planning decision was made, in excess of sixty-five (65) criminal matters. Further, among the pending matters for which respondent is chargeable are five (5) protracted cases. Three (3) of these cases had previously been brought to the attention of the Hon. Harry Phillips, Chief Judge, Sixth Circuit Court of Appeals by letter dated January 11, 1974, who promptly brought them to the attention of the Intercircuit Assignment Committee. To date respondent has not been advised of any affirmative action. A significant planning factor was the projection of Justice Departments Attorneys that four thousand (4,000) Black Lung claims arising under Part B of the Coal Mine Health and Safety Act, 30 U.S.C. 901, had been rejected at the administrative level and were expected to be filed in the Eastern District of

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Kentucky seeking judicial review; and almost four hundred (400) Part A safety violations, civil, were in the United States Attorney's office at Lexington, Kentucky for filing. The Black Lung cases are deemed to be within the priority directive of *Webb* v. *Richardson,* 472 F. 2d 529, 538 (6th Cir. 1972). Finally, inquiry established that the Pike County Circuit Court has two (2) excellent judges and no back log in excess of one (1) year.

In this context, a case by case analysis was made of pending civil cases. In the group of removal cases those depending on pure diversity, 28 U.S.C. 1332, were identified and on respondent's own motion orders were entered to show cause why the case should not be remanded. In all cases where any suggestion of local prejudice or factual cause was made, the cases were retained.

The instant case is a pure diversity case for personal injuries, pain and suffering arising out of an automobile accident. No permanent injury is alleged or is any impairment of the ability to earn money involved. The defendants responded on the basis of right to have their case tried in the United States District Court at Pikeville.

Under any circumstances except the most chronic, the radical procedure invoked in this instance would not have been considered. It is the respondent's belief that a trial judge has an affirmative duty to exercise discretion in the management of dockets in basic fairness to the litigants. There is no doubt merit in defendants' argument of being in federal court as a matter of right, but that does not outweigh the plaintiffs' right to have a reasonably timely trial. The practice in the Eastern District of Kentucky

since about 1968 has been for defendants, excluding, of course, petitioners in this matter, to remove cases from State Court in the perfect assurance that no trial time would be available in the forseeable future. There is no residual fairness in this practice. Accordingly, and with cases of superior priority pending, respondent has undertaken since January 1974 to give relief to the civil docket. The consequence predictably has been an accumulation of criminal matters which no longer may be deferred. At this writing respondent has pending one hundred and forty four (144) criminal cases which have been culled for pleas. Considering that the Eastern District of Kentucky has the sixth highest weighted filing per judge in the United States in criminal cases, the conclusion is made that for the foreseeable future measured in years, not months, there will be no available jury trial time for non-priority civil cases.

Respondent respectfully declines to request any specific relief under the circumstances.

This the 18th day of April, 1974.

/s/ H. David Hermansdorfer
United States District Judge
Eastern District of Kentucky

RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Response to Petition for Writ of Mandamus has been served upon the petitioners by mailing same to Hon. Frank G. Dickey, Jr., Landrum, Patterson & Dickey, 201 Security Trust Building, Lexington, Kentucky 40507, counsel for petitioners, and upon the plaintiffs, Jay Lee Little and Lona Little by mailing same to Kelsey E. Friend Law Firm, 205 Pauley Building, Pikeville, Kentucky 41501, counsel for plaintiffs, this 18th day of April, 1974.

/s/ H. David Hermansdorfer

RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-206

THERMTRON PRODUCTS, INC. (erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD ..... PETITIONERS

VS.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY ..... RESPONDENT

BRIEF AND APPENDIX OF PETITIONERS

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IN THE

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October Term, 1974

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THERMTRON PRODUCTS, INC. (erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD ..... PETITIONERS

VS.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY ..... RESPONDENT

BRIEF AND APPENDIX OF PETITIONERS

I. OPINIONS BELOW

The Order or Judgment of the United States Court of Appeals for the Sixth Circuit is unreported and appears in the Petition for Writ of Certiorari, Appendix, page 1a-2a. The Order of the United States District Court for the Eastern District of Kentucky, at Pikeville, remanding the Civil Action styled Jay Lee Little and Lona Little vs. Therntron Products, Inc. and Larry Dean Newhard is set forth in the Petition for Writ of Certiorari, Appendix, p. 3a-6a.

II. JURISDICTION

The Order or Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 4, 1974. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

III. STATUTES INVOLVED

The pertinent provisions of Title 28, United States Code, appear in the Appendix, infra, pp. 1a-3a.

IV. QUESTION PRESENTED

Whether a Writ of Mandamus and/or Writ of Prohibition should issue to the Respondent, a United States District Court Judge, where the statutory right of removal, in a diversity action, has been arbitrarily denied the Petitioners, contrary to the mandatory and unambiguous provisions of 28 U.S.C. §1441, et. seq., where the Respondent remanded this diversity action to a state court merely because of a crowded docket, when by his own admission the Petition for Removal was timely filed in strict compliance with the statutory provisions and all jurisdictional requirements.

V. STATEMENT OF THE CASE

The facts herein are uncontroverted. Petitioners have a statutory right of removal in a diversity action. This right has been afforded the Petitioners by Act of Congress, in accord with the Constitutional authority to establish tribunals to hear controversies between citizens of different states.

Pursuant to the statutory right of removal, the Petitioners properly and in strict compliance with the provisions of 28 U.S.C. §1441 and §1446, removed this action from the Pike Circuit Court, Pike County, Kentucky to the United States District Court for the Eastern District of Kentucky, at Pikeville. (A. p. 3). This fact is undisputed, and, in fact, conceded by the Respondent herein. (Petition for Writ of Certiorari, Appendix, p. 3a). Recognizing that all jurisdictional requirements had been met, the Respondent properly assumed and exercised jurisdiction over the within action. No objection to jurisdiction has ever been made by any party.

Nevertheless, after more than nine months had elapsed, after the proper removal by the Petitioners, and shortly after the Petitioners had served notice to take the discovery depositions of the plaintiffs below, the Respondent, *sua sponte,* entered an Order requiring the Petitioners to show cause why the action should not be remanded to the Pike Circuit Court since "there is no available time in which to try the above styled action in the foreseeable future." (A. p. 14). This

Order was entered despite a finding made by the Respondent that the within action "was removed pursuant to the provisions of 28 U.S.C. §1446." (A. p. 14).

Petitioners responded to the aforementioned Order, within the ten days ordered by the Respondent, and objected to remand upon the grounds that the same would deny the petitioners their statutory right of removal. (A. p. 16). Further objection was made to any remand upon the grounds that once the Respondent had determined that the Petition for Removal complied with the statutory requirements, with respect to jurisdictional allegations, the District Court was vested with jurisdiction and that the Respondent had no authority, whatsoever, nor any discretion to divest the District Court of jurisdiction over the parties or subject matter. (A. p. 16). Petitioners also declared that they did not believe they could receive a fair and impartial trial in the Pike Circuit Court. (A. p. 16).

Nevertheless, the Respondent, after having conceded that the Petitioners have a right of removal, that this action was properly removed, and after having exercised jurisdiction for more than nine months, remanded this case to the State court, stating as follows:

> "That right afforded the defendants, however, must be balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action. The Court finds the right to choice of forum to be of little particular consequence. The plaintiffs' right to a speedy decision on the merits of their cause of action is of much greater significance."

As justification for this balancing process, the Respondent cited a heavy case load and crowded docket, with underlying priorities, as evidence of the impairment of the plaintiffs' right of redress. Respondent concluded that the statutory rights of the Petitioners herein would not suffer if this action was remanded. (Petition for Writ of Certiorari, Appendix, pp. 3a-6a)

Petitioners, thereafter, sought extraordinary relief, by Writ of Mandamus and/or Writ of Prohibition, in the United States Court of Appeals for the Sixth Circuit. (A. p. 21). The relief sought by the Petitioners was founded upon the following principles:

1. It is the exclusive right of the Petitioners, pursuant to 28 U.S.C. §1441, et seq., to remove this action from State court, which right may not be substantively or procedurally denied these petitioners, nor may it be "balanced," weighed, or otherwise, against other discretionary considerations where the action was properly removed in all jurisdictional requirements and in strict compliance therewith.

2. Respondent has no authority, whatsoever, or any discretion to divest the United States District Court for the Eastern District of Kentucky of jurisdiction over the parties or subject matter, where the District court recognized, assumed, and properly exercised jurisdiction, in a case properly removed, where there is no objection, nor question with regard to jurisdiction, and where it is the mandatory duty of the Respondent to retain jurisdiction, once properly determined and exercised as herein done.

3. The Memorandum, Opinion and Order of Remand clearly ignores and violates the mandatory and unambiguous provisions of 28 U.S.C.§1441, et seq., so as to deprive the petitioners of their statutory rights.

Respondent replied to the aforementioned statements by stating, in essence, that removal is but a mere privilege and subject to judicial discretion. Although the Respondent stated that "there is no doubt merit in defendants' argument of being in Federal Court as a matter of right," it was asserted that this does not outweigh the plaintiffs' right to have a reasonable timely trial. (A. p. 35).

On June 4, 1974, the United States Circuit Court of Appeals for the Sixth Circuit denied the Petition for Writ of Mandamus and/or Writ of Prohibition upon the grounds that it did not have jurisdiction to review the Order of Remand. This Court granted Certiorari on February 18, 1975.

V. SUMMARY OF ARGUMENT

Petitioners have a statutory right of removal, in a diversity action. No discretionary authority or power exists to remand a case to State court. A cause, properly removed to District Court, should not be remanded if it was properly removable upon the record as it stood at the time of the filing of the Petition for Removal, as in the instant case. Only if an action is removed "improvidently," and if the District Court is without jurisdiction can a case be remanded. Respondent has conceded that the within action was properly removed in strict compliance with the statutory provisions and all jurisdictional requirements. Furthermore, the Respondent recognized, assumed, and exercised jurisdiction over the within action for more than nine months after the proper removal by the Petitioners. The Order of Remand was not founded upon informed judicial determination that the removal was improvident, or that the District Court lacked jurisdiction, or any other legal conclusion but was arbitrarily based upon considerations of docket priorities and impairment of the plaintiffs' right of redress. Such considerations have no legal foundation in the statutory scheme. Respondent arbitrarily remanded the action upon purely discretionary grounds, after having properly assumed and exercised jurisdiction, thereby denying the Petitioners their statutory right of removal.

The refusal of the Circuit Court of Appeals for the Sixth Circuit to accept jurisdiction, determine the issue

involved herein, and grant the relief sought by these petitioners permitted unlimited discretion to the Respondent and other District Court Judges to remand cases, even though properly removed, as they see fit. The effect of such unbridled discretion, upon orderly judicial administration, is unwarranted. Therefore, the Petitioners are entitled to the relief sought herein.

VI. ARGUMENT

A WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION SHOULD ISSUE TO THE RESPONDENT, A UNITED STATES DISTRICT COURT JUDGE, WHERE THE STATUTORY RIGHT OF REMOVAL, IN A DIVERSITY ACTION, HAS BEEN ARBITRARILY DENIED THE PETITIONERS, IN VIOLATION OF THE MANDATORY AND UNAMBIGUOUS PROVISIONS OF 28 U.S.C. §1441, et seq., WHERE THE RESPONDENT REMANDED THIS DIVERSITY ACTION MERELY BECAUSE OF A CROWDED DOCKET, WHEN BY HIS OWN ADMISSION THE PETITION FOR REMOVAL WAS TIMELY FILED IN STRICT COMPLIANCE WITH THE STATUTORY PROVISIONS AND ALL JURISDICTIONAL REQUIREMENTS.

The inherent authority rests with this Court to intercede and direct the Circuit Court of Appeals for the Sixth Circuit not only to decide a case which has been wrongfully remanded, but also to direct the Respondent herein to retain jurisdiction of the within action. It is imperative that a Writ of Mandamus and/or Writ of Prohibition issue to the Respondent

commanding the District Court to set aside the wrongful Order of Remand and retain jurisdiction of this action and prohibit the District Court from abdicating the mandatory jurisdictional responsibilities required by Statute. To rule otherwise would grant all District Court Judges' unbridled discretion to remand diversity cases for which there would be no review, and leave non-resident removing parties without any remedy. Such a decision would have chaotic effect upon judicial administration. This effect, as well as the effect of statutory repeal, by implication, would be certainly unwarranted.

Neither the language nor the spirit of 28 U.S.C. §1441, et seq. prevents a Circuit Court of Appeals from exercising jurisdiction to hear and decide a case which has been wrongfully remanded. Furthermore, 28 U.S.C. §1441 et seq. neither grants nor permits the respondent any discretion, whatsoever, to remand a case, properly removed in strict compliance with all statutory and jurisdictional requirements.

It is undisputed that the Petitioners, in every respect, properly removed this action to District Court. Respondent, in remanding this case to State court, upon purely discretionary grounds, violated the mandatory and unambiguous provisions of 28 U.S.C. §1441, et seq. There is no purely discretionary power or authority to remand a case to State court. Although the Respondent takes exception from a semantic standpoint, to this principle, it is clear that

the Respondent had no discretion to remand this case. Were it otherwise, the statutory provisions would be rendered ineffective. Also, the same would constitute statutory repeal by implication, which is not favored.

Petitioners recognize that if an action is improvidently removed and jurisdictionally defective, it should be remanded. However, such is not the case here. The Order of Remand, entered by the Respondent, was not founded upon informed judicial determination that the removal was improvident, or that the District Court lacked jurisdiction, or any other legal conclusion, but was arbitrarily based upon considerations of docket priorities and impairment of the plaintiffs' right of redress. Such Order of Remand was not only wrongful but void. Petitioners submit that the Order of Remand, in the instant action, was based only upon certain considerations which have no legal foundation in the Statutory scheme and should be declared void.

With respect to the principle that there is no discretionary authority to remand, the Court stated in *Vann* v. *Jackson*, 165 F. Supp. 377 (E.D.N.C. 1958), at pp. 380-381, as follows:

> "(T)he proposition has been advanced that the Court had discretionary power to remand this case to the state court, even though properly removed to the federal court. In considering this question, the court must exercise care to determine that a discretionary power does exist,

> and that it will be in the interest of justice to exercise such discretion.
>
> * * * Since there is no means for reviewing an order remanding a case to a state court, the court should act with caution in determining whether or not a power to remand exists. (Citation omitted). The Court is without power to remand if no discretionary power exists.
>
> * * * It is concluded that where congress has provided both a state and a federal forum, and has further provided for actions first brought in the state court to be removed to the federal court, *no discretionary power exists to remand the case to the state court.*" (emphasis added).

In *Isbrandtsen* vs. *District 2, Marine Engineers Beneficial Association,* AFL-CIO, 256 F. Supp. 68 (E.D.N.Y. 1966), the District Judge met the argument that despite the fact that the Court had jurisdiction, that it also had discretion to remand, at page 77, as follows:

> "The Union urges the court to remand to the state court despite a finding that it has jurisdiction. It advances a most unusual argument. It agrees that, regardless of the forum, federal law should and will regardless of the forum, federal law should and will be applied . . . . It assumes that despite a finding of federal court jurisdiction, this court has the discretionary power to remand and reminds the court that, should it remand, its order would not be

> subject to review . . . . Having jurisdiction, this court, in my view, has no discretionary power to remand in a case such as this which does not call for the application of the doctrine of abstention. Even if there were such a discretionary power, the Court would not exercise it in favor of a remand."

From these cases, it is clear that no discretionary power exists to remand this case to the State court. Furthermore, the Respondent admittedly exercised jurisdiction over the within action for more than nine months, and, therefore, had no discretionary power to remand this case.

In *Davis* vs. *Joyner*, 240 F. Supp. 689 (E.D. N.C. 1964), the identical question presented in the case of *Vann* vs. *Jackson, supra*, and *Larkin* vs. *Roseberry*, 54 F. Supp. 373 (E.D. Ky. 1944), was presented to the Court. The court, therein, stated at page 691, that the court's authority to remand is found in Title 28 U.S.C. §1447 (c) and provides that the District Court shall remand if "it appears that the case was removed improvidently and without jurisdiction." It was held that this was certainly not the case in that instance, and it is certainly not the case, in the instant action.

The contention propounded by the Respondent, obviously favoring discretionary power to remand, has been consistently rejected. Respondent is apparently the first District Court Judge to actually infer discretionary power, *sue sponte*, to remand or

infer such discretionary power from the statutory provisions, where such discretion is not founded upon any legal basis or jurisdictional basis but solely upon discretionary considerations, such as a crowded docket. Such discretion cannot be justified. Only if an action is removed "improvidently," which means "wrongfully or without legal basis" and if the District Court is without jurisdiction can a case be remanded. *Harlin Laboratory* vs. *Topp's Chewing Gum*, 131 F. Supp. 262, 267 (E.D.N.Y. 1955). The instant case was neither removed improvidently nor without jurisdiction. Thus, it was improper to remand the same.

With regard to the citation by the Respondent of a heavy case load and crowded docket, and balancing the same with underlying priorities and impairment of the plaintiffs' right of redress, one Court has specifically addressed itself to such argument concerning remand.

In *Romero* vs. *ITE Imperial Corporations*, 332 F. Supp. 523 (D.C.P.R. 1971), a timely petition for removal was filed on January 19, 1971. On July 7, 1971, the plaintiff filed a motion to remand based upon the grounds that a remand would speed up the proceedings and would therefore be in the interest of justice. The Court stated, at page 526, as follows:

> "The right to remove an action from a state court to the Federal District Court is a statutory right and it is a right that has existed since the

original Judiciary Act of 1789. (Citations omitted) 'The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants.' (Citation omitted).

Plaintiff's argument to the effect that a remand would speed up the proceedings in this case and would therefore be in the interest of justice is not correct . . . *Once the statutory requirements for the right of removal have been met, this court cannot order a remand on discretionary grounds such as the alleged speedier trial to be afforded the plaintiff.*" (emphasis added).

Thus, the remand of this case by the Respondent, in the "interest of justice" to provide an earlier trial date, was improper and must be remedied by issuance of a Writ of Mandamus and/or Writ of Probition to the Respondent herein.

The statutory right of removal is a valuable right which must be protected by the District Courts. *Home Insurance Co.* vs. *Morse*, 20 Wall 445, 22 L. Ed. 365 (1874); *Muller* vs. *Lyke Coastwise Line*, 144 F. Supp. 135 (S. D. Tex. 1940); and *Gentle* vs. *Lamb-Weston, Inc.*, 302 F. Supp. 161 (N.D. Maine 1969). Thus, when a District Court is presented with an action of which it has cognizance it may not turn the matter over for adjudication to the State Court.

Mach-Tronics, Incorporated vs. *Zirpoli*, 316 F. 2d 820 (9th Cir. 1963).

Article III, §2 of the Constitution of the United States provides that the Judicial power of the United States shall extend to controversies "between citizens of different states." This action is one between citizens of different states. Congress has promulgated statutory procedures and requirements extending such judicial power in the form of the removal statute. Respondent has recognized that the purpose of this statute was specifically to relieve a party of the possibility of local prejudice, with the predecessor of the present removal statute aptly entitled the Prejudice or Local Influence Act of 1867. (Petition for Writ of Certiorari, Appendix, p. 6a). Petitioners have declared that they did not believe they could receive a fair and impartial trial in the State court. (A. p. 16). Thus, the relief sought by the Petitioners should be granted by this Court.

As stated in Moore's Federal Practice, Volume 1, §0171 (3.-2) at p. 701.29:

> "Despite frequent agitation to eliminate or curtail diversity jurisdiction especially in light of the ever increasing work load of the Federal Courts, diversity continues to provide a foundation for a substantial part of the cases in the lower Federal Courts. From the foundation of the Republic and during the ensuing years, the lower Federal Courts have been a cohesive force, during both quiet and tumultuous times, holding

this Nation together under the binding principles of Justice under law. * * * local Courts alone cannot resolve the conflicts and lead the way. * * *

* * * the Constitution envisions a working partnership between the State and Federal Courts under which each forum may enforce the law of the other sovereign when it is deemed appropriate. *If delay in the Federal Courts has become excessive, as it no doubt has in many places, remedies should be sought which strike at the cause of the delay and which do more than merely relocate the problem in the State Courts. The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal jurisdiction which serves a legitimate function under the Constitution, only weakens the Federal System under which we have long prospered and, with fair success, have done justice between disputants.*" (emphasis added).

Regardless of whether the problem be one of a crowded docket or affording litigants earlier trial dates, attempts should not be made to merely relocate the problem in State court. This the Respondent and Sixth Circuit have attempted to accomplish. In so doing, the Circuit Court of Appeals for the Sixth Circuit has clearly ignored a basic principle previously espoused by that Court. In *Direct Transit Lines* vs. *Local Union, No. 406,* 199 F. 2d 89 (No. 6th Cir. 1952), the Court stated that a cause, removed to District Court, should not be remanded if it were properly removable upon the record as it stood at the time of the filing of

the petition for removal. Thus, the conclusion of the Circuit Court of Appeals for the Sixth Circuit, that it had no jurisdiction to review the wrongful Order of remand, was clearly erroneous, particularly in view of the fact that the Respondent herein conceded that this action was properly removable and properly removed, which fact was presented to the Sixth Circuit and apparently disregarded. Although the *Direct Transit Lines* case, was partially distinguished in *Hat Corp. of America* vs. *United Hatters, etc.*, (D.C. Conn.) 114 F. Supp. 890 (1953), upon the grounds that the Court's attention was principally focused on the propriety of remedy by mandamus, the proposition that a case should not be remanded if properly removed still stands in the Sixth Circuit.

Petitioners submit that the Sixth Circuit should be compelled to grant the Writ of Mandamus and/or Writ of Prohibition in the instant case. Where the order remanding a cause is based upon grounds, not affecting the jurisdiction of the Court, it may be reviewed by mandamus. *Bankers Securities Corp.* vs. *Insurance Equities Corp.*, 85 F. 2d 511 (4th Cir. 1934). Furthermore, in *Travelers' Protective Association of America* vs. *Smith,* 71 F. 2d 511 (4th Cir. 1934) where the propriety of the removal was never challenged, as in the instant case, the District Court Judge entered an Order remanding the case, without finding that it had been improperly removed and without anything appearing of record to show that the removal was in any wise improper. Defendant

appealed from the Order of remand and requested leave to file a Petition for a Writ of Mandamus. The Circuit Court of Appeals for the Fourth Circuit denied the right of appeal, however, granted leave to file a Petition for Writ of Mandamus. In concluding that the case merited a remedy, when the District Court had improperly remanded the case, the Court stated as follows, at pages 512-513:

> "It is clear that the effect of this statutory provision is to forbid appellate review of an order remanding a case when 'the district court shall decide that the case was improperly removed.' In such case, the order of remand is a final determination of the right to remove and is not reviewable by appeal, mandamus or otherwise. And we think that, even though the court may not make an express finding as to improper removal, the order of remand is not subject to review, if upon the record, the presumption can be indulged that the order was made because the court was of the opinion that the removal was improper; for in such case the maxim applies omnia praseumntur rite esse acta. But where, as here, it clearly appears that the order was made, not because the court decided that the cause had been improperly removed, but because of a remittiture entered after it had admittedly acquired jurisdiction, we do not think that either the words or the spirit of the statute prevents our directing that it proceed to exercise that jurisdiction by hearing and deciding the case.
>
> "* * * We have carefully examined the authorities which hold that, because of the provisions of Section 28 of the Judicial Code, mandamus no longer lies to require a district court to hear and determine a case which has been remanded. The

> **language of some of the cases is very broad, but they must be interpreted in connection with the facts under review and in all of them there was express or implied finding of improper removal. In none of the cases which we have been able to find has it been held that the effect of the statute is to deprive the appellate court of the power to require the trial court to hear and decide a case which has been properly removed and which has been remanded solely on the ground of action taken subsequent to removal which did not affect jurisdiction.**
>
> **"If the provision of Section 28 of the Judicial Code be construed as forbidding review of an order of remand in a case such as this, a party in the situation of the defendant here will be without remedy; for it is settled that in cases to which that provision applies the order remanding the case to the state court is not reviewable even upon appeal from the state court. (citations omitted). We do not think that it was the intention of Congress that a party entitled to invoke the federal jurisdiction should be without remedy if the court, without a finding express or implied of improper removal, should remand the case to the state court on a ground arising after removal and not affecting jurisdiction. Certainly we do not find in the statutes any evidence of such intention.**
>
> **"* * * Leave will be granted defendant to file a petition for writ of mandamus requiring the court below to hear and determine the case. It will probably not be necessary for defendant to file such petition, as the learned judge may of his own motion vacate the order remanding the case and proceed to hear and decide it."**

The Sixth Circuit should be compelled not only to hear and decide this matter, but also to grant the relief sought by these Petitioners.

The statutory right of removal, in the instant action, has been arbirarily denied the petitioners. There is no discretionary authority to remand an action properly removed in strict compliance with the statutory provisions and all jurisdictional requirements. Furthermore, there is no discretionary power to remand an action where the District Court has recognized, assumed, and properly exercised jurisdiction. Only if an action is removed "improvidently" and if the District Court is without jurisdiction, can a case be remanded, which is certainly not the instant case. As long as the statutory provisions remain, they must be followed by the Respondent and the Circuit Court of Appeals for the Sixth Circuit. This Court is possessed with the power and authority to direct and compel such compliance and grant the relief sought by these Petitioners.

CONCLUSION

It is respectfully submitted that this Court require and compel the Respondent to set aside the void Order of remand and retain jurisdiction of Civil Action No. 1723 in the United States District Court for the Eastern District of Kentucky, at Pikeville, and prohibit and forbid the Respondent from

divesting the United States District Court for the Eastern District of Kentucky, at Pikeville, of jurisdiction over the subject matter and parties in said action, and further prohibit and forbid the respondent herein from abdicating the mandatory duties, obligations, and responsibilities as Judge in said action. Petitioners further submit that this Court command the Circuit Court of Appeals for the Sixth Circuit to grant and issue the Writ of Mandamus and/or Writ of Prohibition sought by these Petitioners.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

United States Code, Title 28:

§1441 Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

§1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State Court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after

the service of summons upon the defendant if such initial pleadings has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

* * *

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond, the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * *

§1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before if all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State Court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

CERTIFICATE OF SERVICE

I, Frank G. Dickey, Jr., one of counsel for the Petitioners, Thermtron Products, Inc. and Larry Dean Newhard, and a member of the Bar of the Supreme Court of the United States do hereby certify that on the 2nd day of April, 1975, copies of the foregoing Brief for Petitioners were mailed, postage prepaid, to Hon. H. David Hermansdorfer, Judge, United States District Court, Eastern District of Kentucky, P. O. Box 695, Cattlesburg, Kentucky 41129, Respondent, and Kelsey E. Friend Law Firm, Pauley Building, Pikeville, Kentucky 41501, and I do hereby further certify that all parties required to be served have been served.

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Supreme Court, U. S.
FILED
APR 25 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-206

THERMTRON PRODUCTS, INC. (erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD ..... PETITIONERS

vs.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY ..... RESPONDENT

BRIEF AND APPENDIX OF RESPONDENT

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HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY ..... RESPONDENT

BRIEF AND APPENDIX OF RESPONDENT

I. STATUTES INVOLVED

The statutes to be construed are United States Code, Title 28, Sections 1332, 1441 and 1447. They appear in their entirety in the Appendix to this brief, Pages 1a through 4a.

II. QUESTIONS PRESENTED

A. Did the Congress, in requiring the District Court to remand where "the case was removed improvidently", intend to vest in the District Judge a discretion to remand where removal was unnecessary in order to obtain an impartial tribunal?

B. Did the Congress, in providing that a remand order "is not reviewable on appeal or otherwise", intend to vest in the District Court sole discretion to remand and thus deprive the Courts of Appeals and this Court of jurisdiction to consider a remand order, whether by appeal, prohibition or mandamus?

III.

SUPPLEMENTAL STATEMENT OF THE CASE

The respondent, prior to remand, entered a show cause order granting petitioners ten days within which to show how they would be prejudiced by remand to the Pike County, Kentucky, Circuit Court, where an immediate trial could be obtained. (A, 14-15). Petitioners responded claiming that the jurisdictional steps relating to removal had been properly taken and that petitioners "continue to so believe that their interest can best be served by insisting upon the jurisdiction of the United States District Court for the Eastern District of Kentucky." (A, p. 16).

No factual reason or basis was given to support a belief that a fair and impartial trial could not be obtained in the state court. No basis for prejudice in the state court has been suggested or asserted in the United States Circuit Court of Appeals or in this Court. The District Judge was well aware that the state court involved has two able judges, time immediately available to hear this case and the trial which would be accorded petitioners would be as impartial as in the District Court.

IV. SUMMARY OF ARGUMENT

A. The Congress intended to narrow the ambit of retention of removal cases based upon diversity of ciizenship to only those cases where removal jurisdiction exists and removal was providently made to avoid local prejudice. Removal to secure an impartial tribunal is improvidently made when the state court is in fact an impartial tribunal. Whether removal to obtain an impartial tribunal is improvident depends upon all of the facts and circumstances, and the Congress intended to vest in the District Judge a discretion in making that determination. The burden was on the petitioners seeking to sustain jurisdiction to demonstrate factually the partiality of the state tribunal, and having failed to do so, respondent properly remanded.

B. There is no constitutional right to an appeal. Congress provided that a remand order "is not reviewable on appeal or otherwise". This Court could not have entertained jurisdiction by an appeal. Similarly, it cannot entertain jurisdiction otherwise, such as through prohibition or mandamus.

V. ARGUMENT

A. CONGRESS INTENDED TO VEST IN THE DISTRICT COURT DISCRETIONARY REMAND AUTHORITY IN DIVERSITY REMOVAL CASES WHERE REMOVAL WAS IMPROVIDENTLY MADE ON THE ERRONEOUS BASIS THAT THE STATE COURT WOULD NOT AFFORD AN IMPARTIAL TRIBUNAL.

Jurisdiction based upon diversity of citizenship has as its basic object "to secure a tribunal presumed to be more impartial than a court in the state in which one of the litigants resides"[1]. *Barrow Steamship Co.* vs. *Kane,* 170 U.S. 100, at 111, 18 S. Ct. 526, 42 L. Ed. 964 (1897); *Anaconda Copper Mining Co.* vs. *Balak Lava Co.*, 200 Fed. 808 (Montana, 1912).

Original diversity jurisdiction is far broader than diversity removal jurisdiction. In original diversity jurisdiction the action may be filed in the federal court even by the citizen of the state in which the action is filed, so long as the requisite diversity and jurisdictional amount exists. Congress withheld any power to dismiss because improvidently commenced in federal court. 28 U.S.C. Section 1332.

Removal diversity jurisdiction is far more limited. Removal jurisdiction does not exist where one of the defendants is a citizen of the state in which the action was commenced. 28 U.S.C. Section 1441 (b). Remand is expressly authorized by 28 U.S.C., Section 1447. The Congress thus shows a strong intent to permit removal in diversity cases only where jurisdiction to remove is present and the removal is providently made for the purpose of securing an impartial tribunal.

The petitioners would assert that all they need to retain a federal forum is to show diversity removal jurisdiction. Yet 28 U.S.C. Section 1447 (c) authorizes remand for both improvident removal and lack of jurisdiction.

Remand because the Court is "without jurisdiction" is clear and explicit. The existance of removal jurisdiction depends upon appropriate diversity, taking the jurisdictional steps required for removal and the like. Remand for improvident removal can mean only remand where an impartial tribunal exists in the state court.

Improvident removal implicitly involves a determination by the District Court based upon discretion. The District Court is required to remand when "it appears that the case was removed improvidently." Congress is thus saying the District Judge should remand when *it appears to him* that the removal to "secure a more impartial tribunal" was

improvident. See the discussion by Judge Sirica in *City of Burlington, Vermont* vs. *Westinghouse Electric Corp.*, 246 F. Supp. 839, 841-842 (1965).

Respondent suggests that the Congress intended the District Judge to remand where "the case was removed improvidently" because an impartial tribunal exists in the state court. This is not only consistent with the plain language of the statute but it also conforms to the general congressional intent to restrict the removal jurisdiction of the federal courts. *Shamrock Oil and Gas Corp.* vs. *Sheets*, 313 U.S. 100, 108-109, 61 S. Ct. 969, 85 L. Ed 1214 (1941).

Respondent would point out that in diversity removal cases the defendants have not been beset upon by strangers in a strange land. Before jurisdiction in personam can be obtained in a state court against a citizen of another state, there must exist at least the minimal contacts required to meet the "traditional notions of fair play and substantial justice". *International Shoe Co.* vs. *Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). In this particular instance, petitioners were exercising the privilege extended to them by the Commonwealth of Kentucky by operating their motor vehicle on its highways in Pike County, Kentucky, when they negligently injured Jay Lee Little, and his wife. (A, 9). By accepting the privilege and utilizating the highways, the petitioners should not be heard to claim that it offends the traditional notions of fair

play and substantial justice to require petitioners to try the case in the state court of the area voluntarily selected by them unless it be established that the court there is not impartial.

Petitioners do not assert partiality. They give no basis for their assertion that they do not feel that they could obtain an impartial trial in the state court. Petitioners were given an opportunity to present any factual basis which they might have to substantiate their claim that the state court is a partial tribunal. Petitioners offered nothing. The burden of proof to sustain jurisdiction was on them. The District Court properly remanded under the circumstances. *Cannon* vs. *United Insurance Company of America*, 352 F. Supp. 1212, 1220 (D. C., S. C. 1973).

Congress has considered removal a matter of privilege, and it has been so judicially construed. *Shamrock Oil Corp.* vs. *Sheets*, 313 U.S. 100, 106, Footnote 2, *Supra; In re La Providencia Development Corporation*, 406 F. 2d 251 (1st Cir. 1969). Petitioners cannot claim a privilege improvidently asserted by them.

B. 28 U.S.C. SECTION 1447 (d) PROVIDES THAT A REMAND ORDER "IS NOT REVIEWABLE ON APPEAL OR OTHERWISE". THIS PRECLUDES APPEAL, MANDAMUS AND PHOHIBITION.

There is no constitutional right to an appeal. By enacting Section 1447 (d) the Congress intended to limit review of remand orders and thus prevent

delay. *United States* vs. *Rice*, 327 U.S. 742, 751, 66 S. Ct. 835, 90 L. Ed. 982 (1946); *Kloeb* vs. *Armour and Co.*, 311 U.S. 199, 61 S. Ct. 213, 90 L. Ed. 124 (1940). *In re La Providencia Development Corporation, supra.*

Thus, it would seem that even if the respondent was erroneous, the remand order is not reachable by appeal, mandamus or prohibition.

VI. CONCLUSION

The remand order was appropriate in all of the circumstances, but even if erroneous, it is not reviewable by appeal, prohibition or mandamus.

We would suggest that this Court take a long, cold, hard look at removal jurisdiction and the impartial tribunal. We believe Congress intended the District Judge to have some discretion on remand in the circumstances. Most certainly that would relieve congestion and permit the elderly couple, Jay Lee Little and Lona Little, the speedy trial to which they are so justly entitled. The remand order should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Kilmer Combs, of counsel for the Respondent, Hon. H. David Hermansdorfer, Judge, United States District Court, Eastern District of Kentucky, and a member of the Bar of the Supreme Court of the United States do hereby certify that on the 24th day of April, 1975, copies of the foregoing Brief for Respondent were mailed, postage prepaid, to Hon. Frank G. Dickey, Jr., Landrum, Patterson and Dickey, 201 Security Trust Building, Lexington, Kentucky 40507, and I do hereby certify that all parties required to be served have been served.

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BY: C. Kilmer Combs

Counsel for Respondent

APPENDIX

UNITED STATES CODE, TITLE 82

Section 1332

Diversity of citizenship — Amount in controversy — Costs. — (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of

business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "states," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. (June 25, 1948, c. 646, § 1, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, P. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, P. L. 88-439, § 1, 78 Stat. 445.)

Section 1441

Actions removable generally. — (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to

the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. (June 25, 1948, c. 646, § 1, 62 Stat. 937.)

Section 1447

Procedure after removal generally. — (a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand

the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443, of this title shall be reviewable by appeal or otherwise. (June 25, 1948, c. 646, § 1, 62 Stat. 939; May 24, 1949, c. 139, § 84, 63 Stat. 102; July 2, 1964, P. L. 88-352, Title IX, § 901, 78 Stat. 266.)